JUDGMENT : His Honour Judge Humphrey Lloyd QC: 15th June 2001. QBD.

1. This action arises out of a contract which was entered into between the claimant contractor, Sindall, and one or more of the defendants, Solland, for the renovation of Lombard House, Curzon Street, in Mayfair, London W1. (I do not have to consider which defendants contracted with Sindall.) Although the contract price was some £7.8 million, the contract incorporated the JCT Intermediate Form of Contract (IFC 84), with some amendments. The Contract Administrator and Quantity Surveyor was named as Michael Edwards & Associates (MEA). The partner responsible was Mr Yves Allier FRICS, but apparently a retired partner, Mr Jon Steer, agreed with Mr Allier to take on the role as Contract Administrator as a sub-contractor to MEA. Nothing at present turns on this irregular act since Mr Allier took the decisions that I have to consider. The date for possession was 4 January 1999 and that for completion was 15 February 2000.

2. Sadly, the execution of the contract did not proceed in accordance with the parties' original expectations. Progress fell behind. In September 2000 Sindall formally applied for extensions of time in respect of events that had occurred up to 11 August 2000. On 30 October MBA granted an extension of time until 10 July 2000. Sindall was dissatisfied with this decision. It exercised its right to have the dispute determined by adjudication. An adjudication took place in the latter part of 2000. On 8 January 2001 it obtained a decision from an adjudicator which was not entirely what it had looked for, but nevertheless it got an extension of time of 28 weeks up to 8 October 2000 in respect of the events which had occurred up to 11 August. Further events had taken place thereafter so Sindall wished to know where it stood in relation to them. IFC 84 contains the following about time:

*"**Possession and Completion dates***

"2.1 Possession of the site shall be given to the Contractor on the Date for Possession stated in the Appendix. The Contractor shall thereupon begin and regularly and diligently proceed with the Works and shall complete the same on or before the Date for Completion stated in the Appendix, subject nevertheless to the provisions for extension of time in clause 2.3.

"...[Clause 2.2 not reproduced]

*"**Extension of time***

"2.3 Upon it becoming reasonably apparent that the progress of the Works is being or is likely to be delayed, the Contractor shall forthwith give written notice of the cause of the delay to the Architect/the Contract Administrator and if in the opinion of the Architect/the Contract Administrator the completion of the Works is likely to be or has been delayed beyond the Date for Completion stated in the Appendix or beyond any extended time previously fixed under this clause, by any of the events in clause 2.4, then the Architect/the Contract Administrator shall so soon as he is able to estimate the length of delay beyond that date or time make in writing a fair and reasonable extension of time for completion of the Works.

"If an event referred to in clause 2.4.5, 2.4.6, 2.4.7, 2.4.8, 2.4.9, 2.4.12 or 2.4.15 occurs after the Date for Completion (or after the expiry of any extended time previously fixed under this clause) but before Practical Completion is achieved the Architect/the Contract Administrator shall so soon as he is able to estimate the length of the delay, if any, to the Works resulting from that event make in writing a fair and reasonable extension of the time for completion of the Works.

"At any time up to 12 weeks after the date of Practical Completion, the Architect/the Contract Administrator may make an extension of time in accordance with the provisions of this clause 2.3, whether upon reviewing a previous decision or otherwise and whether or not the Contractor has given notice as referred to in the first paragraph hereof. Such an extension of time shall not reduce any previously made.

"Provided always that the Contractor shall use constantly his best endeavours to prevent delay and shall do all that may be reasonably required to the satisfaction of the Architect/the Contract Administrator to proceed with the Works.

"The Contractor shall provide such information required by the Architect/the Contract Administrator as is reasonably necessary for the purposes of clause 2.3.

"...[Clause 2.4 not reproduced]

*"**Further delay or extension of time***

"2.5 In clauses 2.3, 2.6 and 3.8 any references to delay, notice, extension of time or certificate include further delay, further notice, further extension of time, or further certificate as appropriate.

"Certificate of non-completion

"2.6 If the Contractor fails to complete the Works by the Date for Completion or within any extended time fixed under clause 2.3 then the Architect/the Contract Administrator shall issue a certificate to that effect.

"In the event of an extension of time being made after the issue of such a certificate such making shall cancel that certificate and the Architect/the Contract Administrator shall issue such further certificate under this clause as may be necessary."

3. By the end of November 2000 MBA was exasperated with the performance of Sindall. On 1 December 2000 Mr Allier gave Sindall notice under clause 7.2.1 of the IFC 84 conditions. Clause 7.2 reads as follows:

"Determination by Employer

"Default by Contractor

"7.2.1 If, before the date of Practical Completion, the Contractor shall make a default in any one or more of the following respects:

"(a) without reasonable cause he wholly or substantially suspends the carrying out of the Works, or

"(b) he fails to proceed regularly and diligently with the Works, or

"(c) he refuses or neglects to comply with a written notice or instruction from the Architect/the Contract Administrator requiring him to remove any work, materials or goods not in accordance with this Contract and by such refusal or neglect the Works are materially affected, or

"(d) he fails to comply with the provisions of either clause

"3.1 (Assignment) or 3.2 (Sub-contracting) or 3.3 (Named sub-contractors)

"the Architect/the Contract Administrator may give to the Contractor a notice specifying the default or defaults (the 'specified default or defaults')

"7.2.2 If the Contractor continues a specified default for 14 days from receipt of the notice under clause 7.2.1 then the Employer may on, or within 10 days from, the expiry of that 14 days by a further notice to the Contractor determine the employment of the Contractor under this Contract. Such determination shall take effect on the date of receipt of such further notice.

"7.2.3 If the Contractor ends the specified default or defaults, or the Employer does not give the further notice referred to in clause 7.2.2 and the Contractor repeats a specified default (whether previously repeated or not) then, upon or within a reasonable time after such repetition, the Employer may by notice to the Contractor determine the employment of the Contractor under the Contract. Such determination shall take effect on the date of receipt of such notice."

4. Mr Allier's letter from MEA said: "We refer to the contract between Solland Interiors Limited and your company. The date fixed for completion has passed and both we as Contract Administrator and Solland Interiors Limited as Employer are entitled to expect all possible steps to be taken by your company to minimise delays to completion. In contrast, we have been concerned for a considerable amount of time over the low number of operatives on site, which we do not consider commensurate with the amount of work required to be completed on site.

"We do not believe current site activity constitutes compliance with your Company's obligation to carry out the works in accordance with Clause 1.1 and 2.1 of the contract. This letter therefore constitutes formal notice under Clause 7.2.1 of your Company's default in failing to proceed regularly and diligently with the works. The events giving rise to this failure are:

"1. Your company's failure to have sufficient operatives on site.

"2. The failure of Shepherd Engineering Services Limited properly to complete their sub-contract works.

"The circumstances on site have left us with no option other than to serve this notice. We very much hope that we will see an immediate improvement in the level of activity on site."

The Contract Administrator was plainly considering whether Sindall ought, by that stage, to have finished, as he referred to clause 2.1 in which the contractor's obligations as to the time for completion are set out. Obviously, in terms of the physical scope of its work it ought to have finished but in terms of time the question remained: ought the works to have been finished? The date as extended by the contract administrator had passed but was that still the correct date?

5. At this point I remind myself that, not just as a matter of law, as set out by Vinelott J in **London Borough of Merton v Leach** (1985) 32 BLR 51 at pages 89-90, but as a matter of established good practice, that a person in the position of a Contract Administrator has always to consider whether there are any factors known to him which might justify an extension of time, even though the contractor may not have given written notice of them in accordance with a provision such as clause 2.3. This is all the more important if it is necessary to decide whether the Contractor is proceeding regularly and diligently (as also required by clause 2.1). In **West Faulkner Associates v London Borough of Newham** (1994) 71 BLR 1 at page 14 Simon Brown LJ said of the words *"regularly and diligently":*

   "Taken together the obligation upon the contractor is essentially to proceed continuously, industriously and efficiently with appropriate physical resources so as to progress the works steadily towards completion substantially in accordance with the contractual requirements as to time, sequence and quality of work".

   The contractual requirements obviously include the obligation to complete by the completion date, or the date to which it is to be extended. In **GLC v Cleveland Bridge and Engineering Co** (not cited)(1986) 34 BLR 50 Parker LJ said that one "cannot have diligence in the abstract. It must be related to the objective "(see page 77). Thus before issuing a notice under a clause such as this kind, the Contract Administrator has, in my judgment, to determine that objective or yardstick, amongst others, by which the contractor's performance, in terms of regularity and diligence, is to be measured, even though the contractor may not have given a notice. Here, on the evidence before me, Sindall had given (or purported to give) notices under clause 2.3 of IFC 84 about a number of events after 11 August 2000, although it had not quantified their effects. Under clause 2.3 of IFC 84, the contractor is not obliged (unless and perhaps until required under the last paragraph of clause 2.3) to quantify the effect of any notified event, although it is usually done to anticipate a request under that paragraph and to assist in the formation of an opinion favourable to the contractor as it is information to which the Contract Administrator is entitled.

6. The next stage in the history is that, not surprisingly, Sindall disputed that opinion of the Contract Administrator. In a letter of 6 December Sindall said that the Contract Administrator was wrong:

   "We acknowledge receipt of your recorded delivery letter dated 1st December 2000, which only arrived at our offices on the 5th December 2000. Your letter purports to constitute a notice under clause 7.2.1 of the Contract. Firstly we remind you that the parties to the contract as listed within your letters are incorrect.

   "With regards to the content of this letter, we are frankly amazed at the allegation that we have failed to minimise the delays on the Project. How this can be suggested on the facts beggars' belief. We also totally refute your comments that there are insufficient operatives resourcing the Works; ditto the suggested failure by Shepherd Engineering Services to complete their sub-contract works. As a matter of fact, we have maintained and forwarded labour level information to you as the Contracts Administrator on a regular basis.

   "There is substantial correspondence and written material, which clearly records and demonstrates our position - that we are completing the Works as quickly as practically possible using our best endeavours. The Works are either in delay as a result of late information, various or other acts of prevention plus the effect on progress of the activities of the Employer's Artists and Tradesman.

   "Your allegations have not been raised in any previous site progress meetings, nor have we received correspondence from yourself, in respect of Shepherd Engineering Services progress from E. S. P. the Consultant's Engineers. The Default Notice is therefore seen as purely tactical in the face of the current adjudication. Indeed I would be so bold as to assert it is unreasonable and vexatious. We shall contest it if it progresses further.

   *"We suggest in the meantime you consider carefully the Court of Appeal decision in **West Faulkner Associates v London Borough of Newham (**1993).*

   "We remind you that if the Employer determines the contract, we believe this will be treated as unlawful and we will be left no alternative but to take further action against the Employer to obtain our full rights which will include direct loss and damage, finance costs and loss of profit in accordance with the Contract. We hope the Employer understands the full implications of this action!

   "Given the very serious nature of your letter we would request an urgent meeting on site attended by the relevant parties to properly assess the current status and agree a method of monitoring forward progress.

   "The writer will contact MBA during the course of Wednesday 6th December 2000 to agree when this meeting can occur."

I note that in the third paragraph Sindall referred to the grounds which justified an extension of time (and that it referred to the decision of the Court of Appeal in **West Faulkner**).

7. There was then a short interlude in which MEA endeavoured to see whether Sindall would come forward with a feasible programme for immediate completion of the works; but that came to nothing. The matter was then taken out of the Contract Administrator's hands by the Employer. On 21 December 2000, the Employer (here the fourth defendant) allied itself with the view of MEA, and, having heard from MBA that there had been no improvement on site since the issue of the notice, said that it was left with no option other than to exercise its rights under 7.2.2 and to determine Sindall's employment under the contract:

"We refer to the Notice of Default sent to you by the Contract Administrator, Michael Edwards & Associates ("MEA") on 1 December 2000, received by yourselves on 5 December.

"We have been informed by MEA that there has been no improvement on site since the issuing of this Notice and that your company are continuing their default under the contract by failing to work regularly and diligently. This has been confirmed in MEA's letter to you dated 8 December, and indeed our own inspections bear out the total failure of your company to remedy your default.

"Consequently, we are left with no option other than to exercise our rights under clause 7.2.2 and determine your company's employment under this contract. This letter therefore constitutes our formal Notice of such determination.

"We draw your attention to the last sentence of clause 7.2.2 of the contract which states that, "... determination shall take effect on the date of receipt of such further notice", that is, today. We would ask that you also note the provisions of clause 7.6 (a) and (e) of the contract."

On the next day that action was fundamentally disputed for the reasons which had already been set out in Sindall's letter of 6 December:

"We write in connection with the service of notice yesterday determining Sindall's employment under this contract.

"We firstly record that this notice has not come from Solland Interiors but from Solland Interiors Ltd. However, you have appointed security men on site to remove our workforce forthwith

"Lest you are in any doubt, we wish to record here and now that the grounds and the entire basis of this determination are fundamentally disputed all as noted within our letter dated 6 December, 2000 - Ref: SLD/YM not least due to the Parties of the Contract being wrongly noted within MEA letter of 1 December 2000.

"Sindall have strong legal advice to the effect that your conduct can be shown not only to be unreasonable but also vexatious for which there is legal authority from the Court of Appeal. A matter Sindall will be rehearsing with you shortly.

"We wish to disabuse you of any belief that you may presently have that your conduct or that of the Contract Administrator and Design Team in bringing about this determination will achieve the end that you appear to be seeking to reach.

"Whilst at first blush it may seem that you have neatly suspended the obligation to make further payment until completion of the balance of the contract works through your third party contractor, what you have in fact done is precipitate action by way of adjudication and if necessary arbitration, by which Sindall will open up that decision by the contractual means available to it. It is also noted that the relief sought in the present Adjudication does not come within these terms, as the final date for payment of Valuation No. 41 is 28 days or more before the purported determination and is therefore not affected.

"We also wish to stress that if you are of the belief that you were to succeed in contra charging, abating or setting off the completion costs of your third party contractor you are again gravely in error. In fact the converse will arise in that Sindall is now upon a course in which it will seek to recover all of its strict legal entitlements including, but not limited to, management costs, legal costs (which will be claimed as special damages) and the loss of profit on the small balance of work that was yet to be done to achieve practical completion.

"Your professional team and indeed you, were aware of the works that Sindall were performing under very difficult circumstances, not least the consistent failure to make payment in accordance with the contract, and the failure of the whole contractual process caused by your interference with the contract to complete the works. You have said time and again that it is your wish to get possession of the property expeditiously, your actions are likely to achieve the opposite.

"We therefore believe you should reconsider your present action and withdraw this letter. If this letter is withdrawn by 2 January 2001, then we shall take your present action only as being an Instruction to gain possession of the site from 21 December until 2 January 2001 (as Clause 3.15 and/or Clause 2). Failure to withdraw this contractually incorrect letter will cause us to determine the contract as of 22 January - in accordance with Clause 7.9.2 and/or 7.9.1. We also reserve the right to treat your conduct as repudiatory breach. Our position on determining the contract will be made clear within future correspondence.

"Sindall find it highly illogical that you have determined part way through the final stages of the contract and during the commissioning process of the mechanical and electrical services as we have only been able to progress the Works in line with your own tradesmen and works on site The copious records and correspondence clearly evince our position that we are completing the works as quickly as practically possible using our best endeavours. "We would add however that Sindall have gone to considerable effort to ensure that notwithstanding our objection and challenge over the determination Sindall have handed over the building in a safe and orderly manner. This has been hampered by your menacing Security Personnel removing our men from site of the afternoon on 21 December.

"There are of course various elements of materials, plant and attendance items on site which Sindall have left for you to utilise to complete the works not having received written instruction from the Contract Administrator to remove them under clause 7.6. Sindall will be invoicing for use of the same in due course and pursuing for payment through this contract. "We are copying this letter to MEA for their information and as a courtesy. "If there are any matters that you would like to discuss with Sindall then please contact the writer."

So, quite clearly, there was a dispute between the claimant and the defendants as to the propriety of the determination. There was correspondence between the parties' solicitors. On 10 January 2001 Sindall's solicitors wrote:

"We refer to your letter of 3 January 2001 and your letter of the same date to our client on the subject of determination. "Regrettably there has not been much that has not been in difference between us on the facts and the contract. Little point would be served in going over that ground in detail given the divergence in our respective interpretations highlighted in the most recent adjudication. Clearly matters pertinent to the determination will be raked over carefully in the next adjudication. However in view of the refutation in the third paragraph of your letter to this firm we shall have to now see whether your client honours fully without set off the terms of Mr Brewer's decision by next Monday 15 January 2001. We have standing instructions commence enforcement should your clients not comply. Indeed any such failure will lend even greater reason for our client to serve its own notice of default as a precursor to determining its own employment under clause 7.5 of the contract.

"By all events your client's decision not to reflect upon its decision to determine and decline the invitation by our client to return back to complete the balance of the works will be at your client's cost risk. We shall refer to this point in due course inter alia on the question of costs so far as there is need so to do.

"A careful review of the activities of our client and its subcontractors between service of the notice of default and the final determination will certainly not in our opinion demonstrate a failure to proceed regularly and diligently. Quite the converse. Indeed we are now embarked upon a snapshot analysis of this window of the contract, which given the most recent grant of extension of time seems to demonstrate that there were perfectly legitimate grounds for this contract overrunning materially past the Completion Date.

"Having kept our powder dry viz delay and disruption caused to Sindall prior to their determination of C&C your clients should now prepare themselves for the claim that will be advanced in relation to this issue together with delay and disruption suffered by our client's other subcontractors for which your client is ultimately responsible.

"Given the facts, we singularly fail to see how your clients had "no alternative" but to determine. If in the final analysis arbitration becomes necessary your client's witnesses will be put to strict proof of the position you say they maintain. For what it is worth is Jon Steer really going to say he endorsed your client's decision to determine? We shall see.

"Your contention that following the notice of default it was evident that our clients were progressing very slowly on site and showed a lack of motivation which led to the "inescapable conclusion" that "determination was justified" is absolute nonsense. You too will no doubt have advised your clients to undertake a survey of the state and condition of the Works at the date of determination and when you discount the works that have been omitted under the contract and the fact that decorative finishes were your clients' responsibility, you will see what we mean.

"As to the identity of the employer Sindall cannot be criticised for adjudicating against the employer named upon the face of the contract and upon the certificates prepared by the Contract Administrator. The point may hopefully turn out to be academic in the final analysis if your client meets in full our client's strict contract entitlements.

"As regards our client's contention that the determination was unreasonable and/or vexatious we are clearly not ad idem on the facts. You will know as well as we do that the Employer's opinion on these matters is not what is in issue, it is what the Contract Administrator concluded and if we adjudicate the point, what the Adjudicator decides. Of course Mr and Mrs Solland have found it difficult to resist taking up their own causes as and when they felt like it.

"Therefore, whilst we hope matters might not need to be rehearsed in adjudication your client's action in determining out client's employment and doing so plainly wrongly forces the position upon them.

"Our clients are always prepared to talk and if your clients should like to try and advance matters without having to sit in their lawyers' offices into the coming weeks and months at their cost risk they are invited to put forward some dates for such a meeting. Once again for reasons of costs we will invite the court to take cognisance of this invitation."

8. On 8 January the adjudicator appointed to decide the dispute about the extension of time (Mr Brewer) had issued his decision. He decided, amongst other things, that there should be an extension of time of 28 weeks until 29 August 2000 and that Solland should pay Sindall £462,222.51 plus VAT (which was paid). Sindall took stock of the extension of time, and, noting the adjudicator's decision, wrote on 11 January to MEA asking for a further award of an extension of time, as the adjudicator had provided reasons for MEA to reconsider the position or its previous opinion:

"You will no doubt be aware of the Adjudicator's decision issued on 8th January 2001 in respect of our Referral Notice of 10th November 2000.

"Now that this matter is behind us we submit hereunder our further request for Extension of Time.

"Part of the Adjudicator's decision made an award of 28 weeks Extension of Time giving a new Completion Date of 29th August 2000.

"We draw your attention particularly to paragraph 5.44 of the Adjudicator's decision wherein he states "I consider that, as an interim measure, the CA should have awarded an extension of time of no less than 28 weeks by the date of the interim certificate following application No. 41".

"This clearly implies that upon further detailed consideration, a reasonable award is likely to exceed the 28 weeks directed.

"We remind you that this decision was based upon the documents submitted to you at our presentation on Tuesday 26th September 2000 and that submission only took account of events up to 11th August 2000.

"Since that date, numerous further instructions have been issued causing additional delay to and disturbance of regular progress of the Works e.g. Solland Interiors instruction Nos 297 - 366, a further 123 items and FRI Nos PC47 - PC149, a further 102 items.

"The disruption to our progress by the actions of contractors Directly Engaged by the Employer has further delayed and disturbed progress.

"We have submitted to you notices and other correspondence advising you of these events and now seek your prompt formal award of a further Extension of Time up to and beyond the current date.

"We again refer to the Adjudicator's decision, particularly paragraph 5.43 wherein the CA's duty to award Extension of Time is outlined.

"Should you consider that in order for you to make a fair and reasonable award that you require any further particulars, we shall be pleased to furnish them to you upon request. In the meantime, as suggested in paragraph 5.44 of the decision, we are prepared to accept an interim award until you reach a conclusive opinion.

"We are, in the light of the Adjudicator's decision, reviewing all of the matters that require our attention in order that sufficient data and documentation in support of our account can be provided to you at the earliest opportunity. It is our wish to resolve the matter as promptly as possible.

"With regard to the erroneous attempt by the Employer to Determine our Employment under the Contract, we are currently in discussion with our advisors and will revert once we have concluded an appropriate course of action."

Sindall thereafter decided that it was entitled to determine its employment and on 24 January initiated the procedure to do so and later did so. MEA replied to Sindall's letter on 1 February saying:

"We have considered the position generally and invite you to submit such further information to us as you feel fit in support of your claim for an extension of time. We will then consider your submission and ask for any further detailed information we believe necessary."

MEA did not require Sindall to provide information in accordance with the last paragraph of clause 2.3, i.e. to ask for particular further information reasonably necessary for the purposes of deciding either whether the events relied on by it were Relevant Events or which might go to the amount of time for which an extension had been sought.

9. Sindall replied saying that the letter would be responded to in appropriate detail in separate correspondence and that it was rather disappointed that it was not asked to provide any further information. It then made that omission good, because on 9 February it submitted a large package - three lever arch files and supporting documents - in support of its view that it was entitled to a further extension of time. I am told - and for present purposes I will accept, although I do not have the evidence - that what was sent was no more than a substantial repackaging of the information which had been provided earlier on. As will become apparent I do not have to decide whether this is correct. Sindall's letter read:

"In the absence of any response to our letter dated 6th February 2001 we submit the following documentation in respect of our request for an Extension of Time on the above contract.

"Document : "Application for extension of time due to Sindall Ltd from Solland Interiors arising from works carried out at Lombard House, Curzon Street, London W1.

"Document : "Record & Narratives relating to Sindall Ltd claim for Extension of Time at Lombard House, Curzon Street, London W1.

"Document : "Record and Narratives File 1 - 10.

"Document : "Record and Narratives File K - M.

"We refer you to previous correspondence on this matter and request your formal response within 7 days."

That period of seven days would not be a reasonable period within which to require the Contract Administrator to deal with the request if the information was not a repackaging. The letter was met with a letter from MEA on 15 February saying:

"Thank you for your letter dated 9th February 2001, enclosing further documentation support of your Extension of Time claim.

"In order to give full consideration to your report we need to consult other members of the Design Team and accordingly would you please provide a further three copies of your claim."

The next stage was that on the very next day - I am told about 5.30, late in the afternoon - Sindall 's solicitors sent a notice of adjudication to the employer. In a very formal notice it said, amongst other things:

"AND WHEREAS a dispute has arisen between the parties arising under the contract concerning Sindall's claim that its employment was wrongfully determined, in breach of contract, unreasonably and/or vexatiously by Solland on 21 December 2000.

"[In a footnote to this recital Sindall said:

In circumstances where Sindall were conservatively entitled to a further extension of time beyond those awarded to date taking the date for completion of the Works to no earlier than the date of final determination of Sindall's employment on 21 December 2000 or otherwise and alternatively whereby Solland's acts of prevention and/or delay serve to put time at large. In that alternative Sindall therefore claim an entitlement to complete the Works within a reasonable time.]

"...

"In this adjudication Sindall seek a decision from the Adjudicator as follows:-

"(i) A declaration and order that the said determination was wrongful, in breach of contract and therefore unreasonable and/or vexatious and that in the light of that finding Sindall were entitled to take action to duly determine their own employment under the contract.

"(ii) On the basis the Adjudicator finds for Sindall on (i) above that Sindall are entitled to a further interim extension of time to at least the date of determination or alternatively a declaration that time was at large for completion of the Works.

"(iii) In the event the Adjudicator finds for Sindall on (i) above an order that the Respondent pay Sindall financing costs and/or interest due to the effective suspension of any further payment of monies due and owing under the contract by Solland since their wrongful determination. ....."

10. The adjudicator found in favour of Sindall. In his decision of 30 March 2001 Mr Simper decided that Sindall were entitled to a declaration and order that the determination was wrongful as sought. He said:
"I find that Sindall is entitled to a declaration that the determination was wrongful and in breach of contract. I further find the determination was given unreasonably. I do not find the determination was vexatious or accordingly Sindall was entitled to determine its own employment under the contract.
"REASONS
"If the Sindall was failing to proceed regularly and diligently with the works - and I am not so convinced - it was due to the considerable interference of the employer. Under such circumstances no reasonable employer would have determined the contractor's employment. However, I have not seen any evidence to suggest the determination is vexatious."
He said at paragraph 4.2: "Sindall is entitled to a decision that they are due a further extension of time to at least the date of determination or such period the adjudicator shall determine; alternatively a declaration that the time was at large."
His decision in relation to the extension was: "I find Sindall is entitled to a further extension of time of thirteen weeks from 29th August 2000. Therefore, Sindall is liable for liquidated damage for the remaining weeks until the date of determination
"REASONS "I have not been provided any analytical detail of the various delays to the contract via the party and in the time available I am unable to carry out my own analysis. However, clause 2.3 of the contract requires the contract administrator to estimate the length of delay of and carry out an analysis. I therefore estimated the delays previously."
He then goes on to deal with that in greater detail. He says in his reasons: "Although an additional period of delay of seventeen weeks has occurred between this adjudication and that carried out by Mr Brewer [i.e. the previous adjudicator], the mechanisms under the contract to deal with delay have not changed. These mechanisms, although in the word of the referring party may have 'creaked and groaned', still prevent time from becoming at large for the events claimed...".

11. This action was then commenced on 23 April in which Sindall sought to enforce those decisions by way of reclaiming liquidated damages and other matters. On 15 May an application was made by the defendants that the adjudicator acted without jurisdiction in purporting to determine issues relating to extensions of time in his decision dated 30 March 2001. They also seek a stay pursuant to s9 Arbitration Act. That part of the application is not opposed. I therefore have today to decide whether that declaration should be granted, i.e. whether the adjudicator acted without jurisdiction in the second part of his decision when he effectively responded to the request made by Sindall in its notice of adjudication that the adjudicator, having decided the question of determination, should nevertheless go on and deal with the question of extensions of time.

12. The defendants contend that the adjudicator acted without jurisdiction in deciding that Sindall was entitled to a further extension of time. In the light of counsel's submissions, it seems to me that there are two principal issues. First, could it be said that, objectively speaking, there was a dispute between the claimant and the defendants on 15 February (or 16 February when the notice of adjudication was served) sufficient to authorise an adjudicator to decide an extension of time if there had been no other dispute?

13. As a matter of general policy, the courts try not to adopt a legalistic approach to parties' attitudes towards adjudication and to their actions, and certainly not to a party's own definition of the dispute to be referred. The question is whether the other party knew or should known what was intended. The latter is not material in this case, since the notice of adjudication emanated from the claimant's solicitors and therefore should be read on the assumption that it has been carefully and precisely drafted. In general, the purpose of adjudication and the objectives of an adjudication have to be respected, namely to enable both parties to have the benefit of the views of an outsider as to their respective positions under the terms of the contract. A notice of adjudication has to be approached on the basis that if it is

seeking something which is of real practical value to the parties, then one should do what one can to support it rather than to destroy it.

14. I have set out the history. MEA did not respond to Sindall's letter of 11 January and failed to give its opinion as to whether or not Sindall was right in its contentions about the events and a further extension of time. MBA had been well aware for some time that Sindall thought that events had occurred since 11 August were relevant events, and, that they justified an extension of time. In my judgment MEA should have given at least a preliminary response well before Sindall's letter of 6 February. By not doing so, a dispute would have arisen on Sindall's renewal of its previous request of 11 January that there should be an extension of time, when it wrote on 6 February.

15. However I have to decide whether a dispute existed at the date of the notice of adjudication. By then the situation had changed somewhat, because, on 9 February, Sindall had submitted a large amount of documentation. MEA had then made it clear that, in order to deal with the claim in that form, it would need to consult others, and, for that purpose, further copies of the documents would be needed. (This suggests that the documents were either new or contained new matters.) In the light of what had happened and particularly in the context of the determination, the decision about a further extension of time was clearly sensitive. MEA was now being required, indirectly, to reconsider its notice of default in December by considering whether or not an extension of time should be granted. I do not accept, first, that Sindall was entitled to say "either let us have the result within seven days or otherwise there will be a deemed dispute' or, secondly, and in any event that MBA's failure to respond to the letter of 11 February by the time the adjudication notice was served constituted a deemed dispute. Both parties have referred to **Fastrack Contractors Ltd v Morrison Construction Ltd** [2000] BLR 168. This and other decisions concerning what may constitute a dispute for the purposes of statutory adjudication show that the absence of a reply (for example by a person in the position of Contract Administrator) may gave rise to the inference that there was a dispute, e.g. where there was prevarication. But I am unable to reach that conclusion on the present facts. For there to be a dispute for the purposes of exercising the statutory right to adjudication it must be clear that a point has emerged from the process of discussion or negotiation has ended and that there is something which needs to be decided. Here Sindall was waiting to hear from the Contract Administrator. It had not treated MEA's failure to express any opinion on its numerous letters informing MBA of relevant events or on its letter of 11 January as giving rise to a dispute, although it might well have done as one would have expected MEA either to dealt with the application within a matter of weeks or to have asked for further information within a short period. The events relied on were not new and some consideration should have been given to them prior to 1 December 2000. Instead Sindall asked MEA to look at a mass of information to which MEA had not been previously been referred or specifically referred. Even if MEA had not said that it needed more time it would not have been required to provide an answer within seven days. A person in the position of the Contract Administrator must given sufficient time to make up its mind before one can fairly draw the inference that the absence of a useful reply means that there is a dispute. So I accept the defendant's case in so far as the dispute referred concerned the amount of any extension of time for events after 11 August 2000. Sindall's submission of 11 January did not lead to a dispute with the Contract Administrator about that claim. The adjudicator did not therefore have authority to reach a decision on the amount of the extension of time as such. The notice of adjudication (assuming it to refer solely to the claim for an extension of time) was well meant, but, because of the letter of 9 February, was premature.

16. Nevertheless that was not the principal dispute referred to adjudication. The second main issue in this case concerns what was primarily referred to adjudication - the major dispute about whether Sindall's claim that its employment has been wrongfully terminated. Many disputes, particularly ones which culminate in either a general dispute - e.g. about the effect of an instruction, or the absence of an instruction or other information, or the true valuation of work, or about an extension of time (as here) - in themselves break down to a number of what may be called sub-disputes which are (or which are thought to be) an integral part of what is characterised as the dispute. His Honour Judge Thornton Q.C. in **Fastrack** (at page 176) usefully said: *"In other words, the "dispute" is whatever claims, heads of claims, issues or contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference."*

I was of the same view in another case also involving **Sindall - KNS Industrial Services (Birmingham) Ltd v Sindall Ltd,** (2000) 75 Con LR 71. I then said (at page 85), having quoted that part of Judge Thornton's judgment: *"A party to a dispute who identifies the dispute in simple or general terms has to accept that any ground that exists which might justify the action complained of is comprehended within the dispute for which adjudication is sought."*

That was obviously directed to a contention in that case but it applies to any adjudication reference. Where a dispute is referred, there is comprehended within it all its constituent elements, including sub-disputes, contentions, issues (some of which might have been referred separately) - in other words all the ingredients which go into the dispute referred.

17. The dispute about the determination stemmed from MEA's opinion of 1 December that the time for completion had passed and that the state of progress on site was sufficient to justify the conclusion that Sindall was not proceeding regularly and diligently. It is clear from the letter that MEA regarded the decision as to whether Sindall was proceeding regularly and diligently as being intimately connected with and dependent on the time for completion. That was indeed right: as I have said, regularity and diligence cannot be measured until the time for completion has been established. Where in the contract provision is made for the time for completion to be extended, then one has to consider the position of the true date for completion, i.e. the target date to which the contractor should be working and to which it is entitled to work (assuming that there are no other contractual requirements, such as obligations to comply with a programme or phases or stages). It is not necessarily that already fixed in response to an application for extensions of time. It is the time for completion which would have been fixed at that date had the Contract Administrator considered all the facts known to it (whether or not brought to its attention by the contractor) and had it then one what ought to have been done. So the time for completion for the purposes of determining regularity and diligence is the objective time for completion to which the parties were entitled, i.e. the true contractual requirement for completion.

18. It is far too narrow a view to maintain that the contractual date is the date for completion set out in the contract or the extended then current. Both are liable to be reviewed, the latter in particular, just like any other modification of a contractual obligation which the contract leaves in the first instance to the decision or opinion of a third party, such as the Contract Administrator. If the decision or opinion is accepted then it takes effect and the obligation is modified permanently. If it is not accepted then it will only be binding provisionally and temporarily unless and until it is confirmed or varied either by the exercise of the powers to open up review and revise given to an arbitrator or otherwise (**see Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd** [1999] 1 AC 266). If an employer were to rely on the certificate or opinion that a contractor was in default and to determine its employment it would be unfortunate it were then to find, when called upon in arbitration or litigation to justify it, that it had been based on a false premise and that the termination was held to be invalid. It would be equally unfortunate if a contractor, whose employment was determined on the basis of an out of date (but seemingly contractually valid) extension of time, was unable thereafter to demonstrate that the opinion or decisions (including that of the employer) upon which the determination was based were incorrect and thus be unable to establish that, had the proper criterion been used, no one could properly have come to the conclusion that it was failing to proceed regularly and diligently. A party who wishes to rely on the opinion or decision of a third party such as the Contract Administrator which is liable to be reviewed must first satisfy itself that it is right (or at least justifiable) on the facts available at time of reliance and thus take an informed decision to rely on it. Therefore, as Sindall itself maintained in its letter of 6 December 2000, MEA's opinion was liable to be challenged on the basis that it could not properly have been formed MEA had taken into account what was then known to it and what had notified by Sindall, i.e. the variations and all the other matters set out in the letter of 6 December which showed that not just there was a real dispute about MEA's opinion but about the premise upon which it was based, namely that progress had to be measured against MEA's view that the date for completion was 10 July 2000 - a view adopted by Solland but not shared subsequently by Mr Brewer, whose decision is however as binding as MEA's. Mr Simper's view is not in itself relevant on this aspect as his decision had to proceed on the basis that Mr Brewer was right. Mr Brewer's view (if correct) shows why

an employer has to be very careful before adopting the opinion or decision of the Contract Administrator.

19. Accordingly, comprehended within the dispute about the determination and as to whether or not Solland was right to act upon MEA's opinion was the underlying question: was one of the premises upon which that opinion was based correct or were there not events which entitled Sindall to a further extension of time? If there were such events then the Contract Administrator may not have been right to have formed the view that the contractor was then failing to proceed regularly and diligently. So at the heart of the dispute was at least the amount of the extension of time to which Sindall was entitled, not just on 1 December but also on 21 December 2000 when Solland decided to act on MEA's opinion, being then of the view that Sindall had not rectified its apparent default.

20. Maybe - one does not know - the time for completion might still be less than the time actually needed to save Sindall from liability to pay or allow liquidated damages, but it might be such as to require a radical or substantial reconsideration of the opinion that Sindall had failed to proceed regularly or diligently. It is clear that the determination was disputed and, with it, the basis upon which it had been arrived at - see the correspondence after 21 December, exemplified by letter of 10 January 2001.

21. Accordingly, the dispute referred to the adjudicator on 16 February essentially concerned the question of the time within which the works should have been completed, having regard to all the events relied on by Sindall in their letter of 6 December. Indeed, the adjudicator's decision shows that he considered that he had to take into account the matters of complaint on which Sindall had relied. As that was an integral part of the dispute, it was therefore within the authority and the jurisdiction of the adjudicator to reach a decision on it. All Sindall was doing in its notice of adjudication was to build upon what the adjudicator might arrive at in reaching a conclusion in favour of Sindall on the principal issue of determination (which, if Sindall were right, would necessarily mean that it was entitled to some extension of time, as it saw it), and therefore it sought a further decision on that point when it said in (ii):
"On the basis the adjudicator finds for Sindall on (i) above that Sindall are entitled to a further extension of time to at least the date of determination; alternatively a declaration that time is at large for completion of the Works."

21. Therefore Sindall was simply asking the adjudicator to spell out in his decision that part of his reasoning which he almost certainly would have arrived at if he were to find in favour of Sindall on the request (i): "A declaration and order that the said determination was wrongful, in breach of contract and therefore unreasonable and/or vexatious and that in the light of that finding Sindall were entitled to take action to duly determine their own employment under the contract". The request did not mean that the adjudicator was obliged to do so, because it depended upon how he arrived at his decision on request (i). He might have said: "I cannot give Sindall what it seeking but I am satisfied that the Sindall were pressing on against all the odds" (or something of that sort). In my view, request (ii) is no more than saying, as I have already indicated, that the adjudicator was being asked to make a decision on one of the contentions or issues which were constituent elements or essential ingredients of the dispute on termination. The adjudicator acceded to this request and expressed his views on the relevant points, including the extension of time to which Sindall was entitled at the relevant date, and the consequences of that extension. He has thus not arrived at any decision which is beyond his authority or jurisdiction to make under the contract. Accordingly, the defendants are not entitled to the declaration that they seek.

Orders: Application for declaration dismissed with costs. By consent action stayed pursuant to s9 Arbitration Act 1996.