JUDGMENT : His Honour Judge Moseley QC : 21st December 2001.TCC Cardiff.

Introduction

1. In this Judgment I consider two applications in this action. The first is an application under CPR Part 24 for summary judgment to enforce the decision of an adjudicator made under the Housing Grants Construction and Regeneration Act 1996. The second is an application to stay a counterclaim under Section 9 of the Arbitration Act 1996. Both applications arise under the same construction contract but apart from that feature have little in common; so I will deal with them both separately.

Summary Judgment

2. By a contract in writing dated 5 March 2001 Watkin Jones & Son Limited ("the contractor") entered into a written contract with LIDL UK GMBH ("Lidl") for the demolition of existing structures and the construction of a retail store and associated works at High Street, Bangor, Gwynedd, Wales. The contract was in the JCT Standard Form of Building Contract with Contractor's Design, 1998 edition, incorporating various amendments. As is often the case, by the date of the written agreement work had already commenced; it commenced on or about 17 July 2000. Practical completion occurred on 22 June 2001. On 17 July 2001 the contractor submitted to Lidl's agent an application for payment number 11 which it alleges was an application for an interim payment under the contract. Lidl made no payment in respect of that application and on 22 August 2001 the contractor served a notice of adjudication referring what they allege was a dispute within the meaning of Section 108(1) of the 1996 Act to adjudication. Mr Gerard Patrick Bergin was, the following day, nominated under the contract by the Royal Institution of Chartered Surveyors to act as adjudicator and I am indebted to him for a very clear and helpful analysis of the issues in his decision which is dated 25 September 2001. By his decision the adjudicator ordered Lidl to pay Watkin Jones £345,264.99 plus VAT. He further ordered Lidl to pay his fees and expenses totalling £5812.34 inclusive of VAT. In the period between the reference to adjudication and the decision Lidl challenged the jurisdiction of the adjudicator both in a letter dated 31 August 2001 and in a response dated 10 September 2001 to the contractor's notice of referral dated 29 August 2001. I will need to refer to those arguments in due course.

3. I need only refer to 4 provisions in the very long construction contract which the parties entered into. Those provisions are:

   Clause 30.3.2: "Each Application for Interim Payment shall be accompanied by a detailed price statement of work executed and material supplied, referenced to the Contract Sum Analysis".

   Clause 30.3.3: "Not later than 5 days after the receipt of an Application for payment the Employer shall give a written notice specifying the amount of payment proposed to be made …"

   Clause 30.3.4: "Not later than 5 days before the final date for payment of an amount due pursuant to Clause 30.3.3 [this refers to an amount due as an interim payment] the Employer may give a written notice to the Contractor which shall specify any amount proposed to be withheld and/or deducted from that due amount ... "

   Clause 30.3.5 "Where the employer does not give any written notice pursuant to Clause 30.3.3 and/or 30.3.4 the Employer shall pay the Contractor the amount stated in the Application for Interim Payment".

   It is common ground that no notice under Clause 30.3.4 was given by Lidl to the contractor.

4. Under Section 108(1) of the Act it is provided that:

   "A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section. For this purpose "dispute" includes any difference."

   It is common ground that the contractor and Lidl were parties to "a construction contract" but Lidl denies that there was any dispute or difference between the parties arising under that contract. Lidl's defence to the application for summary judgment therefore essentially amounts to a challenge to the jurisdiction of the adjudicator on the grounds that there was no dispute to refer to him.

5. I need say little concerning the structure of the relevant sections of the Act which are by now familiar to judges sitting in the TCC. The essential features of the legislation is that the construction contract must provide that the decision of the adjudicator is to be binding until the dispute is finally

determined by legal proceedings or arbitration or agreement. In default the adjudication provisions of a statutory scheme apply: Section 108(3) and (5). It is common ground in the present case that the contract complies with Section 108(3). The courts have consistently held that the effect of Section 108(3) is to make the adjudicator's decision binding whether or not its validity is challenged (**Macob Civil Engineering Limited v Morrison Construction Ltd** [1999] BLR 93 (Dyson J) so long as his decision is not a nullity for lack of jurisdiction or because he failed to determine the issues which were put before him by the parties (**Bouygues v Dahl-Jensen** [2000] BLR 522 (CA) per Chadwick LJ at 527 (paragraph 27)). In the **Bouygues** case both Buxton LJ and Chadwick LJ described that second issue by posing the question whether the adjudicator answered the right question. If he did, whether he answered it correctly or in the wrong way his decision will nevertheless be binding. If he answered the wrong question his decision will be a nullity (see Buxton LJ at 525 paragraph 12 and Chadwick LJ at page 527 at paragraphs 27 and 28). In **Sherwood and Casson Limited v Mackenzie** (unreported) November 1999 Judge Thornton QC said:

"The adjudication is intended to be a speedy process in which mistakes will inevitably occur ... The court should guard against characterising a mistaken answer to an issue which is within an adjudicator's jurisdiction as being an excess of jurisdiction."

I adopt that observation. It is clear from the example given by Buxton LJ in Bouygues at paragraph 14, where he refers to an accountant valuing the wrong parcel of shares, that what is envisaged is a decision by the adjudicator on an issue which is not referred to him for his decision at all. In the present case therefore there are two main issues: (1) whether there was a dispute between the parties which the contractor was entitled to refer to adjudication under Section 108(1) and (2) if there was, whether that was the dispute which the adjudicator addressed in his decision.

6. The factual background relevant to these issues is as follows. I describe it chronologically. On 8 May 2001 there was a meeting between officers of the contractor and of Lidl to discuss progress towards the drawing up of a final account. On 16 May 2001 the contractor sent to Lidl a letter stating that "I would advise you that our projected final account for the scheme is £1,690,000 plus VAT." According to the witness statement of Lidl's agent, Mr d'Albuquerque, there was a schedule with that letter explaining the figure. No schedule is referred to in the letter and if there was one I have not seen it. It is not, 1 think, the schedule at page 274 of the bundle which contains a different bottom line figure. On 18 June there was a further meeting. At that further meeting there was a discussion of claims made by the contractor which had been the subject of a previous adjudication. It was agreed that the meeting should be adjourned so that a detailed final account could be prepared for discussion. On 22 June 2001 practical completion occurred and between that and the reference to adjudication with which this action is concerned no further work was carried out by the contractor. On 17 July 2001 the contractor sent to Mr d'Albuquerque's office a three page fax comprising a fax cover sheet containing a hand written note and two letters. Mr d'Albuquerque was at the time away on holiday and due to return to his office on 24 July. The cover note so far as material states that "we enclose our valuation for the above as enclosed letter from our JG Davies. We have the package with full breakdown in our office. This can either be posted by Recorded Delivery or can be delivered to your address. Please advise by return." "The above" cross refers to the subject matter of the note which is simply "re Lidl Bangor". The first of the two letters reads so far as material "We enclose our valuation nurnber 11 dated 13 July 2001 for your attention. We should be pleased to receive your certification as soon as possible. Substantiation documents associated with our variations and claim are also enclosed." Those I assume are the "package with full breakdown" referred to in the cover note. The "valuation number 11 dated 13 July 2001" is an inaccurate description of the second letter, which is dated 17 July 2001, not 13 July, 2001. That letter is in precisely the same form as previous applications for interim payments. It states so far as material that "We enclose for your attention our application for payment number 11 for the period up to 13/07/01 as follows …" There follow figures for a gross valuation in the sum of £1,714,769 less retention and less previous payment, giving a bottom line figure described as "amount due" of £444,779.30 plus VAT. The "substantiation documents", consisting of two lever arch files labelled on the spines "final account" and "claims" were delivered to Mr d'Albuquerque's office some time between a telephone call to him on 23 July

and his return to the office after his holiday on 24 July. At the beginning of the final account file there was an introductory page headed "draft final account". That I understand is the document at page 274 of the bundle giving a bottom line figure of £1,714,769, which is the figure given as the "gross valuation" in the second of the two faxed letters dated 17 July 2001. Mr d'Albuquerque had a preliminary look through the two volumes and requested further information which he received on 30 July 2001. That further information contained 4,000 pages of vouchers. In the meantime, on 26 July 2001 there was a further meeting concerning which there is a disagreement in the evidence on behalf of the contractor and Lidl respectively. The contractor by its witnesses asserts that at that meeting there was a general discussion concerning a commercial settlement. On behalf of Lidl it is asserted that "we focused on the final account." It is further said on behalf of Lidl, and not disputed on behalf of the contractor, that "it was agreed that John d'Albuquerque would need to make a detailed analysis of the account." On 21 August 2001, the day before the notice of adjudication, Mr d'Albuquerque wrote to Lidl acknowledging receipt of the 2 files on 24 July 2001 and the subsequent receipt of the vouchers. The letter continues: "Due to the substantial number of tickets provided, in excess of 4,000, it will take some time to verify and check. Having carried out an initial inspection of these tickets, we enclose a separate sheet identifying missing and unreadable copies. Please provide copies of missing tickets or confirm that they do not exist and copies of the unreadable tickets. Should you have any queries regarding the enclosed, please do not hesitate to contact me." Enclosed with the letter there was another letter setting out detailed queries concerning the tickets/vouchers. That was the last contact between the parties before the reference to adjudication, which so far as material contains a definition of the relevant issue as "that Lidl UK GMBH have failed to make payment of monies to Watkin Jones Construction under an interim application number 11 submitted on 17 July 2001. " (Page 278 of the bundle).

7. Lidl promptly challenged the jurisdiction of the adjudicator, denying that there was "a dispute". That challenge was made by letter from Lidl's solicitors dated 30 August 2001. That letter is not in the bundle shown to me but its gist is referred to in a letter in reply dated 31 August 2001 by the adjudicator. It appears from the adjudicator's letter that the grounds upon which Lidl was then arguing that there was no dispute were different grounds from those put to me on Lidl's behalf at the hearing of this application for summary Judgment. Lidl's argument as put to the adjudicator was that application number 11 was solely a final account and final statement which was not due for payment if at all until the latest of the events referred to at Clause 30.5.5 of the contract, which event was many months hence, and that until that date was reached there was no dispute capable of being referred to adjudication. That objection was rejected in the adjudicator's letter in reply. He pointed out to various features in the application which showed that it served a dual purpose ? first as an application for an interim payment and second as the contractor's draft final account essentially setting down the agenda for the contractor's contended entitlement (see page 60 of the bundle). He concludes that "given that the referring party alleges that the notice provisions of condition 30.3 have not been complied with, a matter to be addressed in the response, there is clearly a dispute between the parties." By "the notice provisions of condition 30.3" 1 understand him to refer to notices under Clauses 30.3.3 and/or 30.3.4 (see above) notices which it is common ground was not given. The adjudication then proceeded and in it Lidl repeated the same objection to the adjudicator's Jurisdiction. The objection is at paragraphs 66 to 69 inclusive of Lidl's response to the contractor's notice of referral, that response being dated 7 September 2001. Paragraphs 66 and 67 read:

"66. As noted in previous correspondence Lidl continues to participate in this adjudication without prejudice to its contention that the adjudicator does not have jurisdiction to hear this dispute."

"67. WJ's position [that is clearly a mistake; it should read Lidl's position] is that application 11 is very clearly a final account application from its content relative to the contract conditions, its timing and the conduct of the parties, both before and after that application was submitted. Condition 30 makes a clear provision for how final account applications are to be dealt with and it is clear from condition 30.5.5 that no dispute can have arisen at this stage – ie the contractual mechanism leading to conclusivity as to the balance between the parties is yet to be reached and so the notice provisions of conditions 30.6.1 and 30.6.2 have

yet to be operated. There is therefore no dispute between the parties. There is therefore no dispute to refer to adjudication ".

In his decision dated 25 September 2001 the adjudicator rejected that argument for a second time. His reasoning in summary is that application number 11 had a dual purpose (paragraph 17.2). It was both an application for an interim payment and a draft final account. Since it was an application for an interim payment Lidl was required to serve the notices referred to in Clauses 30.3.3 and 30.3.4 of the contract (see above) failing which it was required by Clause 30.3.5 to "pay the contractor the amount stated in the application for interim payment". Under 30.3.6 that payment was required to be made within 20 days of 17 July and since it was not paid there was a dispute which consequently could be referred to adjudication. The adjudicator therefore concluded that he had jurisdiction to resolve the dispute.

8. At the hearing of the application for summary judgment before me Lidl put its case on jurisdiction in a modified form. Its main argument was that factually there was no dispute. Lidl had been misled into believing that the application was an application for the drawing up of a final account and, being of that view, had given instructions to Mr d'Albuquerque to investigate the account with a view to agreeing it. By the date of the contractor's notice of adjudication no issues in dispute had been identified, the contractor had not asserted that it was entitled to immediate payment, and the notice of adjudication itself did not identify any issue in dispute. His main argument therefore alters its focus from the characteristics of the application to the factual absence of any dispute concerning it. Lidl however also relied on an alternative argument which relies on similar though not identical reasoning to that which it put to the adjudicator. This argument is to the effect that the notice of application read in the context of the other documentation and meetings amounts to a representation by conduct that the application was an application for a final account; that Lidl changed its position in reliance on that representation by not serving the requisite notices under Clauses 30.3.3 and 30.3.4, and that consequently the contractor is estopped from asserting that the application was an application for an interim payment. The argument was not fully developed at the hearing before me but 1 understand the reasoning to be similar to that which was put to the adjudicator: that the application for payment is as a result of the estoppel to be treated as an application for a final account with the consequence that there could be no dispute until the time for payment had arrived.

Was there factually a dispute for the purposes of Section 108(1) of the Act?

9. At the hearing before me the argument on behalf of the contractor as put by Mr Hughes of counsel was essentially that once one accepts that the application was an application for an interim payment, it followed inexorably that after the expiry of the 20 days grace provided for in Clause 30.3.6 of the contract there was a dispute in default of payment. He relied as authority for that proposition on **Halki Shipping Corporation v Sopex Oils Limited [**1998] 1 WLR 726 (Court of Appeal). That was a decision concerning an arbitration agreement to submit disputes or differences to arbitration, an issue which is closely analogous to that which arises in the present case. The decision of the Court of Appeal is perhaps most succinctly put by Swinton Thomas LJ at 761G: *"There is a dispute once money is claimed unless and until the defendants admit that the sum is due and payable"*. Henry LJ in the same case cross referred to the judgment at first instance of Clarke J and quoted it with approval. Clarke J had said: "The Ellerine Bros case [**Ellerine Brothers (Pty) Ltd v Klinger** [1982] 1 WLR 1375] is authority for the proposition that where a party simply does nothing there is a dispute which the claimant is both entitled and bound to refer to arbitration." Mr Hughes argued that that principle applied to the facts of the present case led to the conclusion that 20 days after the notice of application and therefore well before the notice of adjudication was a dispute because of non payment by Lidl. By implication he argued that there was such a dispute whether or not Lidl was investigating the figures and whether or not Lidle knew that there was a dispute. Mr Neill on behalf of Lidl referred me to another authority at first instance, being **Fastrack Contractors Ltd v Morrison Construction Limited** [2000] BLR 168 (Judge Thornton QC). At page 177 (paragraphs 27 and 28) Judge Thornton refers to the meaning of a "dispute" for the purposes of the 1996 Act and after referring to **Halki Shipping** and another Court of Appeal decision (**Monmouthshire County**

Council v Costelloe & Kemple Ltd [1965] 5 BLR 83) summarises the principles at paragraph 28 as follows:

"These cases help in showing that a claim and its submission do not necessarily constitute a dispute, that a dispute only arises when a claim has been notified and rejected, that a rejection can occur when an opposing party refuses to answer. the claim and a dispute can arise when there has been a bare rejection of a claim to which there is no discernible answer in fact or in law ".

Essentially Mr Neill's argument is that that is an accurate précis of the legal principles, and that since there was no rejection by Lidl of the claim or any refusal by Lidl to answer the claim that at the date of the notice of adjudication there was no dispute. Mr Hughes argued that Judge Thornton's decision was wrong and that I ought not to follow it. I accept Mr Hughes' argument. It appears to me that paragraph 28 of Judge Thornton's decision in Fastrack is irreconcilable with the ratio of Halki Shipping and defines the word "dispute" too narrowly. In my judgment 1 am bound by Halki Shipping to find that it is not necessary either to refuse to answer or to reject a claim. Passive failure to admit suffices to constitute a dispute. Mr Hughes had an alternative argument which in the circumstances I need not consider. He pointed out that the argument now under consideration (the absence on the facts of any dispute) was a new argument which had not been put to the adjudicator and that consequently there was an ad hoc submission to the jurisdiction of the adjudicator notwithstanding any absence of any dispute on the facts, the only challenge to the jurisdiction of the adjudicator being based on the argument which is no longer advanced being that the notice of application was an application for a final account in respect of which the time for payment had not arrived (see above). 1 am not convinced by that argument. The jurisdiction of the adjudicator was challenged by Lidl on the basis that there was no dispute and I am not persuaded that the new manner of arguing that issue amounts to a submission to jurisdiction. That seems to me wrong: whether a person submits to the jurisdiction of an arbitrator or adjudicator is a question of fact and so long as factually the jurisdiction of the adjudicator is challenged on the grounds that there is no dispute it appears to me that there can be no submission to jurisdiction however the argument concerning the absence of a dispute is put. However since i agree that there was a dispute this issue does not arise.

Estoppel

10. Although the estoppel argument was not as clearly put to the adjudicator as it was put to me and though the word "estoppel" was not mentioned to the adjudicator, it was nevertheless part of Lidl's case: see paragraphs 7.1 and 38 of Lidl's response. In particular paragraph 7.1 states that Lidl "has always treated application 11 as a final account application (it was submitted as such) and therefore has not dealt with conditions 30.3.3 and 30.3.4. [Lidl should not be penalised by [the contractor] retrospectively attributing "interim application" status to application 11. The adjudicator dealt with the issue at paragraph 15.8 of the decision where he refers to the estoppel argument and at paragraph 17.5 where he rejects it because "after further enquiry at my initiation Lidl was unable to offer any tangible proof of its assertion. So the adjudicator rejected the estoppel argument on its merits albeit again without referring to the word "estoppel." It follows that the adjudicator decided that the contractor was not estopped from asserting that the application was an application for an interim payment. That is not a decision which Lidl is entitled to challenge: it is not as such a decision concerning jurisdiction and Lidl cannot contend that the adjudicator was not addressing the right question. The fact that the rejection of the estoppel argument by the adjudicator undermines Lidl's argument concerning jurisdiction seems to me irrelevant. So in my view the principle in Macob must be applied and Mr Neill's alternative argument rejected.

No valid application

11. On behalf of Lidl Mr Neill put to me an argument under the heading "no valid application" which 1 understand to be as follows. The dispute which was submitted to adjudication by the contractor's notice of adjudication concerned the failure of Lidl to make payment of monies due to the contractor under Interim application number 11. That is a proposition which I accept. His argument was then that to succeed in the adjudication the contractor needed to prove (1) that it had made a valid application for interim payment and (2) that money was "due" to the contractor pursuant to the

application. Mr Neill then proceeded to argue those two subsidiary propositions in detail. He did not however explain to my satisfaction how those arguments enable Lidl to avoid the consequences of Section 108(3) of the Act (the section which provides that the decision of the adjudicator is binding). The resolution of the subsidiary issues in Lidl's favour would not lead to the conclusion that the adjudicator had no jurisdiction under the Act: there was a dispute (see above) arising under a construction contract which the contractor had a right under Section 108(1) to refer for adjudication; so all the requirements of a valid reference were established. It appears therefore that the argument is directed to the proposition that the adjudicator addressed the wrong question and that consequently his decision was a nullity. There is indeed a reference to that principle in paragraphs 32 to 34 inclusive of Mr Neill's skeleton argument though it is unclear to me whether that is part of the argument which begins under the heading "no valid application" at paragraph 11. I assume however that that is the case since the argument at paragraph 11 would fail unless it were directed to the wrong question principle. According to paragraph 32 of the skeleton argument the right question is whether the contractor satisfied the burden of showing that the contractor was entitled under the contract to receive the payment for which it had applied. 1 regret that I cannot see how it could be successfully argued that the adjudicator had failed to address that question. He did address it. He considered the application for payment, held that it was an application for interim payment, considered the terms of the contract and in particular Clause 30.3.5 and the effect of that Clause in a case in which the employer had not served the notices envisaged by Clause 30.3.3 and 30.3.4. He came to the conclusion that the contractor was entitled to the payment for which it had applied. He may well have reached the wrong conclusion, as Mr Neill argued he did, but that is not the point: Unless he failed to address the right question the decision is binding whether right or wrong. Consequently 1 cannot see that Mr Neill's argument under the heading "no valid application" leads anywhere.

12. In case however I have not correctly understood his argument I should briefly refer to the component parts of the argument. So far as his argument that there was no valid application for interim payment is concerned he made the following points:

(1) *"Clause 30.3.2 (above) requires that could "each application for interim payment shall be accompanied by a detailed price statement of work executed and material supplied referenced to the contract sum analysis". His argument began with the proposition, which I accept, that the application was not accompanied by such a priced statement of work. I cannot see however that that proposition assists his argument. Clause 30.3.2 clearly distinguishes between the application and the priced statement which must accompany it; so a failure to serve the accompanying statement does not lead to the conclusion which the proposition is apparently intended to establish that there was no valid application. In my judgment the argument is misconceived: there was a valid application which, unfortunately, was not accompanied as required by the contract by a detailed statement of work executed and material supplied. That doubtless was a technical breach of contract by the contractor but that breach leads to no consequences. The contract does not impose any sanction for non compliance with the requirement. So in my judgment the argument leads to no useful conclusion. In any case it does not establish lack of jurisdiction or that the adjudicator addressed the wrong question.*

(2) Mr Neill's skeleton argument refers to Clause 4.16.11 of the Employer's Requirements, which is not I think exhibited to any of the witness statements and does not form part of the material supplied to me. There are extracts from the Employer's Requirements at page 284 of the bundle onwards but they do not contain Clause 4.16.11. However 1 am content provisionally to accept that the Clause is correctly quoted in Mr Neill's skeleton argument at paragraph 16. According to that paragraph the Clause reads:

"At least 2 days before the end of each established period of interim valuations the contractor shall submit to [Lidl's agent] all necessary supporting information to enable [Lidl's agent] to certify payment due to the contractor."

Again Mr Neill's argument starts with the proposition that all necessary supporting information was not supplied. Again 1 cannot see that this argument assists Lidl's case. The information which was to be provided was to support something and I infer in the absence of the document itself that it was to support

an application for interim payment. The non supply of the supporting information does not render the application a nullity. So I reject this argument for the same reasons as I reject argument (1) above.

(3) *Mr Neill claimed support for that proposition from the Scottish case of* ***Maxi Construction Management Limited v Morton Rolls Ltd*** *(Outer House of the Court of Session, Lord Macfadyen, unreported 7 August 2001). In this case the contract did not comply with the requirements of Section 110(1) of the Act with the consequence that the Scottish Scheme applied. Paragraph 12 of that Scheme defines the meaning of "claimed by the payee" as meaning "a written notice given by the party carrying out work under a construction contract to the other party specifying the amount of any payment or payments which he considers to be due specifying to what the payment relates .... and the basis on which it is .... calculated". The contractor chose not to go to adjudication but immediately started court proceedings. Lord Macfadyen held at paragraph 29 of his judgment that the application for interim payment in issue in that case did not comply with the requirements of paragraph 12 of the Scheme and was consequently not a "claim by the payee". The judge therefore refused a decree de plano, which 1 understand to be the Scottish equivalent of summary judgment under CPR Part 24. In my judgment that decision has no application to the present case: the judge was not considering the decision of an adjudicator and in particular was not considering whether an adjudicator lacked jurisdiction or had addressed the wrong question.*

(4) *The third argument was that the documentation supplied by the contractor to Lidl and in particular the two lever arch files were an application for a final payment and not an application for interim payment. I need not deal with that argument in detail: it is not directed to the jurisdiction of the adjudicator nor to the issue, if different, of whether he asked the right question. The issue was considered by the adjudicator and he expressed a decision about it. Even if his decision on the issue is wrong, it is binding until a court or arbitrator decides otherwise. So it does not constitute a defence to a summary judgment application.*

(5) *The fourth argument turns on Clause 30.3.1.2 which provides for the pattern of interim payments and concludes with the proviso "that the employer shall not be required to make any interim payment within one calendar month of having made a previous interim payment." Mr Neill's argument is apparently that since application for interim payment number 10 was made on 2 July 2001 the contractor was not entitled to submit a further application for interim payment on 17 July 2001. That argument seems to me misconceived: Clause 30.3.1.2 is concerned with payment within one calendar month, not with the making of an application for payment within one calendar month. However as I understand paragraphs 21 and 22 of the skeleton argument read together the argument is to the effect that an application for interim payment may only he made under Clause 30.3.1.2 "as and when further amounts are due to the contractor": because payment had been made under application number 10 some time after 2 July 2001, no further payment was "due" until at the earliest one calendar month had expired: consequently the application for interim payment was premature and, presumably, invalid. That is not a sound argument. It confuses the creation of the debt and its payment. The contractor's case was that the money was due in the sense that there was a contractual liability to pay it. So the contractor was entitled to make an application for an interim payment. Lidl was not required to make any such payment within one calendar month of the payment which it made in respect of application number 10, but that does not make application number 11 a nullity. In any event again the argument does not go to either jurisdiction or to the right question issue.*

(6) *Mr Neill's final argument was that it was implicit in Clause 30.3.2 (see above) that the application for interim payment could only be made in respect of work which had already been executed and materials which had already been supplied (a proposition which 1 accept); the application included claims for work not yet executed and materials not yet supplied, a proposition which is established by paragraph 22 of Mr d'Albuquerque's first witness statement which I also accept; no money was "due" in respect of that unperformed work and unsupplied materials. 1 am uncertain to what the quotation "due" refers but assume that it is a cross-reference to Clause 30.3.1.2 providing that an application for interim payment may be made after practical completion "as and when further amounts are due". If the proposition (which is not expressly stated in the argument) is that the inclusion in an application for interim payment of amounts in respect of unexecuted work and unsupplied materials renders the application a nullity I reject it. Amounts were claimed in respect of work which had been executed and materials which had been supplied and the claim for those sums was properly made in the application. The defect identified by Mr d'Albuquerque does not in my judgment render the application a nullity. In my judgment (see below) the*

adjudicator was correct in ordering the full amount claimed in the application to be paid, that being the consequence of Clause 30.3.5 requiring the contractor to pay "the amount stated in the application for interim payment". Even though that amount included an amount in respect of work which was unperformed and materials which had not been supplied payment was nevertheless required under Clause 30.3.5.

No money "due" to the contractor from Lidl

13. This is second leg of Mr Neill's argument that to succeed the contractor had to show that it had made a valid application for interim payment and that a payment was "due", but it appears also from the concluding part of the skeleton argument that Mr Neill may be relying on this leg of the argument as an independent argument, that argument being that the adjudicator had not examined the state of the accounts between the parties and had therefore failed to ask himself the right question. The adjudicator's decision was that because of the failure of Lidl to serve a notice under Clauses 30.3.3 and/or 30.3.4 of the contract it was unnecessary to examine the accounts between the parties, that being the effect of Clause 30.3.5 and in particular the words "the employer shall pay the contractor the amount stated in the application for interim payment".

14. Mr Neill referred to 2 authorities in support of his argument. In my judgment neither authority lends him support. The 2 cases are:

(1) **SL Timber Systems v Carillion Construction Ltd** (unreported), a decision of the Outer House of the Court of Session (Lord Macfadyen). In this Scottish case the judge was considering a contract which did not contain a similar provision to that in Clause 30.3.5 of our contract, and which did not comply with the requirements of Section 110 of the Act, with the consequence that the Scottish Scheme regulations applied. The employer had failed to serve an effective notice of intention to withhold the payment and the adjudicator had in the circumstances not inquired into the question whether money was due under the contract to the contractor. Lord Macfadyen held that that was wrong, that the absence of a notice of intention to withhold payment under Section 110(1) of the Act does not relieve the adjudicator from the burden of deciding whether money is "due", but he also decided that the adjudicator's failure to undertake that enquiry did not deprive him of his jurisdiction, with the consequence that the adjudicator's decision was enforced notwithstanding the adjudicator's error. That lends no support to Mr Neill's argument in the present case: Lidl's obligation to pay as ordered by the adjudicator does not turn on Section 111(1) of the Act but on Clause 30.3.5 of the contract. The issue therefore is not what sum is "due" under the contract, but what amount is stated in the application for interim payment. In any event the second leg of Lord Macfadyen's decision, if correct, as in my judgment it is, leads to the conclusion that the adjudicator in the present case had jurisdiction even if his failure to investigate the accounts between the parties was an error. In my view 1 should follow Lord Macfadyen's decision with which I agree.

(2) The second case upon which Mr Neill relied was **C & B Scene Concept Design v Isobars Ltd** (Mr Moxon Browne QC sitting as a deputy High Court Judge). The contract in this case was an earlier edition of the contract which is in issue in our case and it did contain Clause 30.3.5. However the judge came to an initial decision that because the parties had failed to complete Appendix 2 to the contract Clause 30.3.5 had no application, that consequently the Scheme provisions applied and not the contract provisions, that consequently the adjudicator had fallen into fundamental error by considering the wrong question. So there is a fundamental distinction between the facts of the **C & B Scene Concept Design** case and our case. One of the judge's reasons for refusing summary judgment to the claimant in that case was the failure of the adjudicator to inquire into the value of work performed and material supplied, the adjudicator having held that that was an irrelevant exercise because of Clause 30.3.5. The judge held that that nullified the decision, the adjudicator having addressed the wrong question. In my judgment that reasoning has no application in the present case in which Clause 30.3.5 does apply: **C & B Scene Concept Design Limited** is an authority on the meaning of the Scheme and on the consequences of a failure of an adjudicator to inquire into the accounts when the Scheme provisions apply. It has no application to a case in which the relevant provision is that in Clause 30.3.5. So whether the decision in C & B

Scene Concept Design is correct or not – Mr Hughes argued that it was wrong ? it has no application.

15. For those reasons I reject Mr Neill's argument. In my judgment the adjudicator was right not to inquire into the state of the accounts between the parties, being bound by Clause 30.3.5 to order Lidl to pay the contractor the amount stated in the application for interim payment.

16. For all those reasons the contractor is entitled to summary judgment on the claim, Lidle having no real prospects of successfully defending it and there being no other reason why there should be a trial of the action.

The Counterclaim: should it be stayed?

17. The second application is an application to stay the counterclaim under the provisions of Section 9(4) of the Arbitration Act 1996. The relevant statutory. provisions are:-

S9(1): A party to an arbitration agreement against whom legal proceedings are brought (... by way of ... counterclaim) in respect of a matter under which the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

S9(4): On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

18. The counterclaim which it is sought to stay is 11 pages long and essentially it attacks the 2 decisions which have been made in favour of the contractor by adjudicators – ie the decision of Mr Bergin and an earlier decision of another adjudicator, Mr Phillip Eyre. The details of the counterclaim are for present purposes not important.

19. The contractor's case in support of the application for a stay is as follows:

(1) Article 6A of the contract provides that *"where the entry in the appendix stating that "Clause 39B applies" has not been deleted then subject to Article 5 [which is concerned with adjudication] if any dispute or difference as to any matter or thing of whatsoever nature arising under this contract .... shall arise between the parties ... it shall be referred to arbitration in accordance with Clause 39B and the JCT 1998 Edition of the Construction Industry Model Arbitration Rules".*

There is a corresponding Article 6B which applies where the words "Clause 39B applies" in the appendix have been deleted. In such event any dispute is to be determined by legal proceedings.

(2) The words "Clause 39B applies" in Appendix 1 have not been deleted. Ergo any dispute is to be referred to arbitration.

(3) Clause 39B itself remains in the contract and has not been deleted. It provides as follows:-

"Where pursuant to Article 6A either party requires a dispute or difference to be referred to arbitration then that party shall serve on the other party a notice of arbitration to such effect in accordance with Rule 2.1 of the Model Arbitration Rules which states..

"Arbitral proceedings are begun in respect of a dispute when one party serves on the other a written notice of arbitration identifying the dispute and requiring him to agree to the appointment of an arbitrator"

an arbitrator shall be an individual agreed by the parties or appointed by the person named in the Appendix in accordance with Rule 2.3 which states:

"If the parties fail to agree on the name of an arbitrator within 14 days (or any agreed extension) after: (1) the notice of arbitration is served .... either party may apply for the appointment of an arbitrator to the person so empowered."

(4) Machinery is provided in the contract for the appointment of an arbitrator".

20. Mr Neill argued:

(1) That it had been the intention of the parties to strike out the words "Clause 39B applies" in Appendix 1 to the contract but by mistake they had omitted to do so. In support of that proposition Mr Neill referred to:

(a) Page 9 of the Employer's Requirements dated July 2000 which states that "Clause 613 applies". He argued that the Employer's Requirements were incorporated into the contract by Article 4. 1 reject that argument. Article 4 does not incorporate the Employer's Requirements into the contract but merely identifies them as a document signed by the parties. 1 accept however that it is relevant to consider the employer's requirement document as providing evidence of the intention of the parties when entering into the contract. Mr Neill is assisted in that argument (which is an argument directed to rectification and not to the construction of the contract) by the third recital to the contract which recites that the contractor has examined the Employer's Requirements.

(b) The deletion in Appendix 1 to the contract of the paragraphs identifying the appointor of the arbitrator (see page 157 of the bundle). 1 agree that that provides some evidence that the intention of the parties as established by the Employer's Requirements continued until contracting. That however is again an argument directed to rectification rather than to the construction of the contract.

(2) That by virtue of the deletion of the machinery for the identification of an appointor in Appendix 1 to the contract the arbitration agreement was null and void, inoperative or incapable of being performed within the meaning of Section 9(4) of the 1996 Act. 1 reject that argument. Clause 39B.1.1 provides machinery for the appointment of an arbitrator by agreement, and in default of agreement the parties can apply to the court: see the Arbitration Act, 1996 Section 18.

21. In my judgment Mr Neill's argument is essentially that the contract needs to be rectified. In support of his case on that issue he can refer to the second witness statement of Mr Ramsey which deals with the intention of the parties, to the relevant part of the Employer's Requirements, and to the deletion of the machinery in Appendix 1. That possibility of rectification is however not a ground on which I can refuse a stay: the possibility of rectification does not render the agreement null or void or inoperative or incapable of being performed within the meaning of Section 9(4) of the Act. Whether or not the contract should be rectified is itself a dispute or difference which must be referred to arbitration, and by Clause 39B.2 the arbitrator has power to rectify the agreement. Insofar as that rectification affects his own jurisdiction the arbitrator has power under Section 30(1)(a) of the Act to rule upon his own substantive jurisdiction and in particular to decide whether or not there is a valid arbitration agreement.

22. In my view therefore the counterclaim must be stayed under Section 9 of the Act.

Conclusion

23. I will in the circumstances and for the reasons set forth in this judgment:

(1) Give summary judgment for the claimant on the claim and;

(2) Stay the counterclaim.