JUDGMENT : **His Honour Judge Humphrey Lloyd QC :** 27th December 2001. TCC

1. In this action the claimant, by its Part 8 claim, asks for a declaration that an adjudicator who has embarked on an adjudication between the claimant (Watkin Jones) and the defendant (Lidl) does not have jurisdiction to do so. It also asks for an injunction to restrain Lidl from continuing with the adjudication. The history leading to this action indicates that adjudication was first used in circumstances for which it was not originally intended and thereafter the problems inherent in the original wish of Watkin Jones for a penultimate payment have become larger and larger.

2. The contract between Watkin Jones and Lidl is for a new retail store in Bangor, Gwynedd. It includes the JCT standard form of building contract for contractor's design, 1998 edition. It is dated 5 March 2001. The contract sum was £919,074. In July the contractor made an application for a payment. Mr Neill, who appears for Lidl, helpfully drew my attention to some documents which are to be found in the annex to the witness statement of Mr Weir.

3. On 17 July Watkin Jones wrote to Lidl's agent enclosing its valuation number 11 dated 13 July. It asked for certification as soon as possible. The documents either accompanying that application or which are to be read with it showed that the application was for £1.7 million odd (gross) less retention of 3 per cent and previously paid, making a net total of £340,182.24 plus VAT. The first of the supporting documents was headed "draft final account" and set out valuations which arrived at that figure.

4. Lidl apparently treated the application as a valuation for a final account. It thus did not do what the contract says that an employer should do which is to give notice under clause 30.3.3 stating the respects in which the amount applied for was not due to the contractor. Clause 30.1 provides for interim payments to be made as provided by clauses 30.1 to 30.4. The scheme is simple: the valuation applied for by the contractor must be a proper gross valuation for the purposes of interim payment as provided by clause 30.2A. The employer may then question it within five days by a notice as provided by clause 30.3.3. If that is done the employer is only obliged to pay the amount which it does not question which is then becomes the amount due. The employer also has a further right, as provided by clause 30.3.4, within five days to specify an amount proposed to be withheld or deducted from the amount due, that is, the amount which the employer considers is the due amount under clause 30.3.3.

5. So Watkin Jones therefore received no notices but it was not paid the amount for which it had applied. As it believed that the application was a proper interim application it sought adjudication. Mr Bergin was appointed as the adjudicator. At that point Lidl raised the issue that no payment was due because in fact the application was a final account application under clause 30.5 and was not an application for interim payment under clause 30.3. Lidl indeed had to do so because it had given no notices. Clause 30.3.5 says where the employer does not give any notice pursuant to clause 30.3.3 and/or to clause 30.3.4 the employer shall pay the contractor the amount stated in the application for an interim payment. Under clause 30.5 no such notices are needed in relation to the Final Account and Final Statement submitted by the contractor.

6. In his careful decision Mr Bergin set out the points which he considered he had to decide which included whether the application was for a Final Account and Final Statement and, if it were not, then whether there were any grounds upon which Lidl could resist payment of the amount applied for, having regard to its failure to serve notices under clauses 30.3.3 and 30.3.4.

7. In his consideration of Lidl's case, he said that if Lidl could resist payment then he might have to consider what would be the amount truly due. However he took the view that that (third) point was outside his jurisdiction. In my judgment, strictly speaking, it would not have been outside his jurisdiction but it was a point which would not arise if he had decided the earlier points in favour of Watkin Jones and not Lidl, and that is what he did. He decided that the application was "both a draft Final Account as well as an Application for Interim Payment" but that it was subject to the notice provisions of the contract. As the notice provisions had not been implemented he decided that the failure overrode the requirement, he said, for the ascertainment of amount properly due.

8. Implicit in that it seems that he thought there might have been some substance in Lidl's point that if in fact it had got its foot in the door by giving the notices then he would be entitled to consider the amount properly due. In my judgment that is correct. If Lidl had given a notice under clause 30.3.3 then, subject to the contents of that notice, the adjudicator would have the right to consider what was then properly due. So on 25 September he ordered and decided that the amount applied for should be paid £345,264.99 plus VAT.

9. On 1 November Lidl tried to retrieve the situation by issuing a notice of adjudication in which it characterised as a dispute the following:
"Nature and description of the dispute. The dispute relates to the properly calculated sum which ought to have been applied for in Watkin Jones' application number 11 dated 17 July 2001. ...."

   In the text of the notice of adjudication it set out the relevant events. It also referred to the fact that there had been discussions.

10. Mr Simon Hughes, who appears for Watkin Jones, says that they may have been without prejudice discussions but there were discussions about the amount that ought to have been included in application number 11, i.e. what was the true gross valuation of the work. He said that the parties had been unable to reach agreement on the differences and therefore some dispute existed. The notice concluded by saying that the nature of the redress sought was "a revision of application number 11 to determine in accordance with clause 30, the properly calculated sum which ought to have been applied for ("the revised sum"). Lidl sought a decision that the sum payable under Application number 11 was that revised sum and if the amount paid by it was greater than the amount which Watkin Jones had applied for and been paid then there should be a repayment of the supposed overpayment.

11. The RICS appointed Mr Siamet Soudegar as the adjudicator. After correspondence with the parties Mr Soudegar said, in a letter of 30 November:

   "I do not have jurisdiction to decide on the issue, which was to decide that in the event of overpayment on Application/Payment No 11 what amount should be reimbursed to Lidl, even though there was no withholding notice on that particular application. ... The dispute is further complicated by the fact there is no further application for payment e.g. number 12 and it is not related to the final account".

   Mr Soudegar therefore resigned. Lidl was thus left without an adjudicator. On 30 November it got in touch with the RICS and on 5 December the RICS appointed Mr Stuart V. Kennedy as adjudicator. Lidl then gave a further notice of adjudication on that same day in almost precisely the same terms as those used a month earlier on 1 November. Mr Kennedy has taken the view that he has jurisdiction in respect of the subject matter of the notice of adjudication, as appears from his letter to parties of 14 December. Watkin Jones maintains that he has not got jurisdiction and issued the Part 8 Claim on 18 December 2001. After the usual shortening of time, it comes before me today, 27 December, as vacation judge.

12. Watkin Jones took proceedings to enforce Mr Bergin's decision. Its application for summary judgment was heard by His Honour Judge Moseley QC who on 21 December issued in draft the judgment that he proposed to give. It has been agreed by Judge Moseley (and by the parties) that I may look at that judgment but I do so on the assumption that there will be no material alterations to it between now and the time when the judge actually delivers that judgment. Essentially the same arguments as were raised before Mr Bergin were raised before Judge Moseley. He has decided that Watkin Jones was entitled to summary judgment for the amount claimed. Judge Moseley concluded, amongst other things, that the adjudicator was right not to inquire into the state of the accounts between the parties as he was bound in the absence of the notices by clause 30.3.5 to order Lidl to pay Watkin Jones the amount stated in the application for interim payment.

13. In the course of his judgment he considered a number of the authorities now relied on by Mr Neill (who again appeared for Lidl on that occasion). They included **SL Timber Systems Ltd v Carillion Construction plc** (now reported [2000] BLR 516). Lord Macfadyen held that the failure to give a notice under section 110 of the Housing Grants etc Act 1996 (HCGRA) did entitle an adjudicator to investigate the underlying merits, as it were, to see what was actually due. However he decided that

the adjudicator's decision, although wrong in not doing so, had to be enforced. Lord Macfadyen said (at page 524):

"[20] The more significant issue in the present case, in my opinion, is whether the defenders' failure to give a timeous notice under section 111 had the effect that there could be no dispute at all before the adjudicator as to whether the sums claimed by the pursuers were payable. The section provides that a party "may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment". In my opinion the words "sum due under the contract" cannot be equiparated with the words "sum claimed". The section is not, in my opinion, concerned with every refusal on the part of one party to pay a sum claimed by the other. It is concerned, rather, with the situation where a sum is due under the contract, and the party by whom that sum is due seeks to withhold payment on some separate ground. Much of the discussion of the section in the cases has been concerned with what circumstances involve "withholding" payment and therefore require a notice. Without the benefit of authority, I would have been inclined to say that a dispute about whether the work in respect of which the claim was made had been done, or about whether it was properly measured or valued, or about whether some other event on which a contractual liability to make payment depended had occurred, went to the question of whether the sum claimed was due under the contract, therefore did not involve an attempt to "withhold ... a sum due under the contract", and therefore did not require the giving of a notice of intention to withhold payment. On the other hand, where there was no dispute that the work had been done and was correctly measured and valued, or that the other relevant event had occurred, but the party from whom payment was claimed wished to advance some separate ground for withholding the payment, such as a right of retention in respect of a counterclaim, that would constitute an attempt to "withhold ... a sum due under the contract", and would require a notice of intention to withhold payment. There are some circumstances in which it is difficult to be clear as to whether the position which the party against whom the claim has been made wishes to adopt is to be analysed as disputing that the sum is due under the contract or as seeking to withhold a sum due under the contract. It occurs to me, too, that Scots law may analyse some cases differently from English law. For present purposes, however, it is in my view unnecessary to draw the borderline between the two categories with precision, because it is clear that the adjudicator has adopted the extreme position that any and every attempt to dispute a claim made under a construction contract is to be regarded for the purposes of section 111 as an attempt to "withhold" payment, and therefore as requiring a notice of intention to withhold payment. In my opinion, in so holding, and in consequently declining to address whether the sums claimed by the pursuers were due under the contract, the adjudicator fell into error.

[22] In my opinion, the absence of a timeous notice of intention to withhold payment does not relieve the party making the claim of the ordinary burden of showing that he is entitled under the contract to receive the payment he claims. It remains incumbent on the claimant to demonstrate, if the point is disputed, that the sum claimed is contractually due. If he can do that, he is protected, by the absence of a section 111 notice, from any attempt on the part of the other party to withhold all or part of the sum which is due on the basis that some separate ground justifying that course exists. It is no doubt right, as the adjudicator pointed out, that, if the section did require a notice of intention to withhold payment as the foundation for a dispute as to whether the sum claimed was due under the contract, it would be relatively straightforward for the party disputing the claim to give such a notice. But that consideration does not, in my view, justify ignoring the fact that the section is expressed as applying to the case where an attempt is made to withhold a sum due under the contract, and not as applying to an attempt to dispute that the sum claimed is due under the contract. Nor, in my view, is there merit in the adjudicator's concern that acceptance of the defenders' construction of section 111 would render the 1996 Act largely ineffective. I see no difficulty for an adjudicator in reaching a provisional determination of a dispute as to whether the sum claimed is due under the contract. That is what, on the adjudicator's own view of the section, the adjudicator would require to do if the party disputing the claim on the basis that the sum claimed was not due under the contract gave a notice of intention to withhold payment on that ground. In my opinion, therefore, the adjudicator erred in holding that the pursuers were relieved, by the defenders' failure to give a timeous notice of intention to withhold payment, of the need to show that the sums claimed were due under the contract."

14. Lord Macfadyen thus agreed, for example, with **Woods Hardwick Ltd v Chiltern Air Conditioning Ltd** [2001] BLR 23 ? see paragraphs 9 and 10 of the judgment of His Honour Judge Thornton QC. Mr Neill's submission was, essentially, that there was no difference between a section 110 notice and the notices required under clauses 30.3.3 and 30.3.4.

15. Mr Neill also relied on **C & B Scene Concept Design Limited v Isobar Limited**, unreported, a decision of Mr Moxon Browne QC sitting as a deputy High Court judge. That was a case which did involve the JCT form for contractor's design but the form of contract was not the same as the present one. The case also concerned the meaning of the statutory Scheme. In this case the Scheme does not come into play because Clause 39A of the 1998 edition of the JCT form contains provision for adjudication and I do not need to consider it.

16. The fundamental question which I have to decide is the issue that arose for decision in SL Timber and which might have arisen but did not arise for decision in a case to which both parties referred: **VHE Construction plc v RBSTB Trust Co Limited** [2000] BLR 187, a decision of His Honour Judge Hicks QC. In that case, on very similar grounds and a similar form of contract, being the 1981 edition of the contractor's design form, there had been two adjudications.

17. The second adjudication was concerned with the amount which was due to the claimant, even though that had been the subject, in a sense, of the earlier decision of the first adjudicator where a decision had been given as to the amount that was due. But it appears from the account of the course of the second adjudication that the second adjudicator took the view that he had jurisdiction and had made a decision. So the issue before the judge was the effect of the two decisions. Judge Hicks, it appears, was not required to decide whether the second adjudicator had the jurisdiction which he had assumed, notwithstanding the decision of the first adjudicator, but that is a point which I have now to decide.

18. I have come to the conclusion that Watkin Jones is right and the second, or in this case, the third adjudicator does not have jurisdiction. The point is a simple one. The jurisdiction of an adjudicator stems from the notice of adjudication. In this case, as I have recounted, the notice of adjudication referred to the amount which is the subject or should have been the subject, according to Lidl, of application number 11. It said that there were, or had been, differences about that sum.

19. The contract, in my judgment, makes it clear that when a contractor applies for payment it expresses its view as to the gross valuation required by clause 30.2A. To that extent this contract does not differ from many other contracts. This contract provides that the employer then has within five days to decide whether that opinion as to the valuation is acceptable or not. If it is not acceptable then a notice must be given under clause 30.3.3. That will specify the amount of payment proposed to be made in respect of that application, the basis on which such amount is calculated and to what the amount relates (as provided by clause 30.3.3). In other words, the employer is to set out its view of what is due for the purposes of the gross valuation under clause 30.2A.

20. Although it is not material to the decision but it emphasises the commercial structure created by the provisions to which I have referred and does affect clause 30, an amendment was made to clause 30.3.2 deleting the existing clause and adding a new clause:
"Each application for an interim payment shall be accompanied by a detailed priced statement of work executed and material supplied referenced to the contract sum analysis".

    This enables the employer both to understand the contractor's valuation and to provide a reasoned statement of where its valuation departs from the contractor's valuation.

21. The contract is thus precise. If a notice is not given under 30.3.3 or 30.3.4 then the amount applied for must be paid. Watkin Jones' entitlement under those provisions was settled by the first adjudication. Lidl's attempt to avoid the absence of the notices by trying to characterise the application as one for a final account was rejected by the first adjudicator, who upheld Watkin Jones's view of the contract and the facts.

22. I do not consider that it is open to either party to this contract thereafter to go back over such ground, and certainly not the employer in this case, and thus to say that the valuation which ought

to have been the subject of the payment stemming from an application number 11 was other than that applied for by Watkin Jones. Under this contract the route by which that contention may be raised is the route provided by clause 30.3.3. Its provisions are not therefore the same as those considered by Lord Macfadyen in **SL Timber**.

23. It is not possible, in my view, to avoid those consequences under this form of contract where no notice has been given by then asserting that the dispute, which undoubtedly there does exist, is justiciable as it concerns prior questions namely what ought to have been applied for, what the valuation was, etc., since they re the rationale for clause 30.3.3. What Lidl might have done, after Mr Bergin's decision, was to have sought a declaration from an adjudicator as to what is quite clearly in dispute which is the true value of the final account. In reality Watkin Jones' application was tantamount to a Final Account and Final Statement, as Mr Bergin recognised. But I do not consider that Lidl's notice of adjudication can be read in that way in the light of the first adjudicator's decision, which decided that application number 11 was a reference to an application for an interim payment and not a reference to a Final Account.

24. In addition, the notice cannot be read that in that way because the nature of the redress sought by reference to application number 11. The notice did not seek the redress of payment or overpayment in terms of the final account. Accordingly on that first and central point the submissions for Watkin Jones are correct.

25. Mr Neill's submission was otherwise right since the judgment of Lord Macfadyen **in SL Timbers** and other authorities do establish what is in any event plain that, in the absence of a provisions such as clause 30.3.3 and 30.3.5, an adjudicator (and of course an arbitrator) will have to decide what sum is truly due as an interim payment if that is the dispute or an integral part of the dispute referred. For example, for the purposes of the HCGRA or contractual provisions that give effect to it or comparable provisions in contracts not governed by the Act, one cannot withhold what is not due. Unless the amount due is agreed by the paying party it has first to be established, if necessary by the adjudicator. As Lord Macfadyen rightly said in paragraph 22 of **SL Timbers:**

"....the absence of a timeous notice of intention to withhold payment does not relieve the party making the claim of the ordinary burden of showing that he is entitled under the contract to receive the payment he claims. It remains incumbent on the claimant to demonstrate, if the point is disputed, that the sum claimed is contractually due."

26. The JCT form with contractor's design, as used here, correctly uses "withhold" since clause 30.3.3. deals with questioning the amount due and clause 30.3.4 deals separately with the other circumstances which may entitle the employer not to pay the sum due by giving notice or what is to be withheld or deducted. If its contract had not been subject to clause 30.3.3 ad 30.3.5 (or provisions to the same effect) Watkin Jones would have had to justify its application number 11 in the first adjudication had the dispute resulting from Lidl's failure to pay so required, i.e. as a result of Lidl's answer to the referral notice. In such circumstances the adjudicator would have to decide the sum to which the contractor was entitled which ought to be the amount for which a contractor applies.

27. On that basis it not necessary to deal with any of the other points raised by Mr Hughes for Watkin Jones but in deference to his arguments and in case my primary reasons are flawed I should say something at least about some of them. First, the resignation of the second adjudicator was not in my view a resignation of the kind provided by for in paragraph 9.2 of the statutory Scheme, to which I as referred but which does not apply of course in this case. That covers the situation where the adjudicator had jurisdiction but ceased to have it because of a decision that had been taken in a prior adjudication. Mr Soudegar's view was there was no dispute so he had no jurisdiction. He was right. The notice of adjudication and his appointment were both invalid. Lidl had no right to adjudicate the dispute that it identified as it did not exist as it had been decided by Mr Bergin. What Lidl was trying to do was to resurrect a non?dispute, because of the absence of the notice under clause 30.3.3. Mr Soudegar was correct.

28. However, secondly, it is not right to say that the resignation or withdrawal of Mr Soudegar, if incorrect or unjustified, would leave Lidl without a remedy. If there had been a genuine dispute it

had a right to an adjudication under section 108 of the HCGRA. Reading clause 39A I have no doubt at all that, where the adjudicator appointed takes the view that there is no dispute and therefore no jurisdiction, then, unless his decision is binding, the dispute in fact and in law does not disappear. It still exists and a party's right to an adjudication on it has to be fulfilled. Accordingly the appointing body (in this instance the RICS) still has the power and the duty to find a new adjudicator. On the facts of this case the already complicated position was not eased by the fact that Lidl then sent in a further notice of adjudication; that was unnecessary because the notice of 5 December added nothing to that of 1 November and did not achieve anything except confusion.

29. Any other conclusion would mean that a party who had raised a bona fide dispute which had an adjudicator had erroneously thought was not justiciable would not get an adjudication. Accordingly the purpose of section 108 would be thwarted. That is not an unappealing construction. The Act must be read and applied in a practical way and not read.

30. Thirdly, Mr Hughes had difficulties in his submission that Lidl might arbitrate. I do not consider that it could commence an arbitration that would not get it anywhere. It could not escape the consequences of clause 30.3.3 and clause 30.3.5. Therefore, in the absence of a notice under clause 30.3.3. there can be no sensible dispute referable to arbitration about application number 11 and the dispute which led to the decision of Mr Bergin.

31. Accordingly, for these reasons I come to the conclusion that Watkin Jones is entitled to the relief that it seeks in its claim form and that the declaration sought in paragraph 1 should be granted. It is not necessary to go further to grant an injunction restraining Lidl since I expect that, in the light of my earlier decisions, an undertaking would be given by Lidl in the terms sought in lieu of an injunction.

Mr NEILL: *My Lord, yes.*

JUDGE LLOYD: *I will simply make an order in terms of paragraph 1 of the Part 8 claim.*

Mr HUGHES: *My Lord, I am grateful for that. The question of costs can probably be dealt with extremely quickly. My clients have put forward a sheet for the summary assessment of costs which ought to be with the court. I have a copy, if it saves time.*

JUDGE LLOYD: *Yes, it would.*

Mr HUGHES: *The costs claimed are £4,386.43 and my Lord may well have seen by way of contrast the figure of nearly £11,000 which would have been claimed by the defendants had they been more successful before my Lord. That is my first point, the point on contrast. The second point is that they are reasonable in themselves, in my submission.*

JUDGE LLOYD: *Yes, I think having laid the foundations there still remains the same point. Mr Neill.*

Mr NEILL: *My Lord, I cannot argue on costs.*

JUDGE LLOYD: *On the whole lot, apart from VAT, because you are both liable for VAT, are you not?*

Mr NEILL: *We are, yes.*

JUDGE LLOYD: *So that it would only be £3,631. Correct?*

Mr HUGHES: *Yes, that is right.*

JUDGE LLOYD: *So order: as paragraph 1 of the claim form; defendant to pay claimant's costs, summarily assessed, in the sum of £3,631. Thank you very much.*

Mr HUGHES: *I am most grateful, my Lord.*

Mr SIMON HUGHES, instructed by Hugh James Ford Simey, appeared on behalf of the claimant.
Mr ROBIN NEILL, solicitor advocate of Bevan Ashford, appeared on behalf of the defendant.