JUDGMENT : **HIS HONOUR JUDGE HUMPHREY LLOYD** : TCC : 17th July 2000

1. This action arises out of the decision of an adjudicator. Unusually, the claimant (KNS) seeks by it and by an application under Part 24 of the CPR to enforce what the adjudicator did not specifically decide should be paid by the defendant (Sindall). KNS says that the adjudicator had no jurisdiction to reduce the figure which he did award and that, on the basis of what he did decide, more is unquestionably due to it. Sindall says that both the action and the application are misconceived. It has made a counter application under Part 24 to obtain summary judgment against KNS on the grounds that its claims are bound to fail.

2. KNS entered into a sub-contract dated 8 October 1998 to carry out mechanical and electrical works for Sindall at Mermaid House, 43 Acacia Road, London NW8 where Sindall were carrying out works for Sir David Alliance. The sub-contract price was originally approximately ,160,000. The contract incorporated the standard conditions DOM/1 subject to the terms of Sindall's order forms.

3. Relevant conditions of DOM/1 included the following:-

21. Payment of Sub-Contractor

21.1 The first and interim payments and the Final Payment shall subject to clause 32 be made to the Sub-Contractor in accordance with the provisions of clause 21.

21.2 .1 The first payment shall be due not later than one month after the date of commencement of the Sub-Contract Works on-site or if so agreed of off-site works related thereto.

21.2.2 Interim payments shall be due at intervals not exceeding one month calculated from the date when the first payment was due.

21.2.3 The final date for payment for the first and interim payments shall be not later than 17 days after the date when they become due.

21.3 .1 Subject to any agreement between the Sub-Contractor and the Contractor as to stage payments and subject to any decision of the Adjudicator under Clause 38A or of an arbitrator or the Courts under Clauses 38B or 38C as the case may be, the amount of the first and each interim payment to the Sub-Contractor shall be the Contractor's gross valuation as referred to in clause 21.4 less

.1 an amount equal to any amount which may be deducted and retained as Retention by the Contractor in respect of the Sub-Contract Works in accordance with clause 21.5;

.2 the total amount previously due in first and interim payments in respect of the Sub-Contract Works.

21.3.2 Not later than 5 days after the date on which any interim payment becomes due the Contractor shall give a written notice to the Sub-Contractor which shall specify:-

.1 the amount of the interim payment which is proposed to be made in respect of the Sub-Contract Works and the basis on which such amount was calculated; and

.2 by way of deduction from such amount, the amount of any payment proposed to be made from the Sub-Contractor to the Contractor and the basis on which such amount was calculated.

21.3.3 Not later than 5 days before the final date for payment of any interim payment, the Contractor may give a written notice to the Sub-Contractor which shall specify any amount proposed to be withheld and/or deducted from the amount notified under clause 21.3.2, the ground or grounds for such withholding and/or deduction and the amount of the withholding and/or deduction attributable to each ground. If no notice is given, the Contractor shall pay the amount stated in his notice under clause 21.3.2 by the final date for payment of it.

21.3.4 Interest *.*

If the Contractor fails properly to pay the amount, or any part thereof, due to the Sub-Contractor by the final date for its payment the Contractor shall pay to the Sub-Contractor in addition to the amount not properly paid simple interest thereon for the period until such payment is made. Payment of such simple interest shall be treated as a debt due to the Sub-Contractor by the Contractor. The rate of interest payable shall be five per cent (5%) over the Base Rate of the Bank of England which is current at the date the payment by the Contractor became overdue. Any payment of simple interest under clause 21.3.3 shall not in any circumstances be construed as a waiver by the Sub-Contractor of his right to proper payment of the principal amounts due from the Contractor in accordance with, and within the time stated in, this Sub-Contract or of the rights of the Sub-Contractor in regard to suspension of performance of his obligations under this Sub-Contract to the Contractor pursuant to clause 21.6 or to determination of his employment pursuant to the default referred to in clause 30.1.1.3.

21.4 Gross valuation :

Subject to clause 37.2.3, where applicable, the gross valuation to be made by the Contractor shall be the total of the amounts referred to in clauses 21.4.1 and 21.4.2 less the total amount referred to in clause 21.4.3 up to and including a date not more than 7 days before the date when the first and each interim payment is due:

1 the total value of the sub-contract work on-site properly executed by the Sub-Contractor, including any work so executed for which clause 16.1 refers and including any work so executed for which a 4.6 Quotation has been accepted by the Contractor and any variations thereto to which Clause 4.6.8 applies, but excluding any restoration, replacement or repair of loss or damage and removal and disposal of debris which in clauses 8B.4 & 8C.4 are treated as if they were a Variation together with, where applicable, any adjustment of that total value under clause 37;

2 the total value of the materials and goods delivered to or adjacent to the Works for incorporation therein by the Sub-Contractor but not so incorporated provided that the value of such materials and goods shall only be included as and from such times as they are reasonably, properly and not prematurely so delivered and are adequately protected against weather and other casualties;

29 Determination of the employment of the Sub-Contractor by the Contractor

***29.2 .1** If before the date of practical completion of the Sub-Contract Works the Sub-Contractor shall make default in any one or more of the following respects; or*

.1 without reasonable cause he wholly or substantially suspends the carrying out of the Sub-Contract Works; or

.2 without reasonable cause he failed to proceed regularly and diligently with the Sub-Contract Works; or

.3 he refuses or neglects to comply with a written direction from the Contractor requiring him to remove any work, materials or goods not in accordance with this Sub-Cont[r]act and by such refusal or neglect the Works are materially affected; or

.4 he fails to comply with the provisions of clauses 26.1 and/or 26.2; or

.5 he fails pursuant to the Sub-Contract Conditions to comply with the requirements of the CDM Regulations

then the Contractor may issue a notice to the Sub-Contractor specifying the default or defaults (the 'specified default or defaults').

29.2 2 If the Sub-Contractor continues a specified default for 10 days from receipt of the notice under clause 29.2.1 then the Contractor may on, or within 10 days from, the expiry of that 10 days by a further notice to the Sub-Contractor determine the employment of the Sub-Contractor under the Sub-Contract. Such determination shall take effect on the date of receipt of such further notice.

29.2.3 If the Sub-Contractor ends the specified default, or the Contractor does not give the further notice referred to in clause 29.2.2 and the Sub-Contractor repeats a specified default (whether previously repeated or not) then, upon or within a reasonable time after such repetition, the Contractor may by notice to the Sub-Contractor determine the employment of the Sub-Contractor under this Sub-Contract. Such determination shall take effect on the date of receipt of such notice.

29.2.4 A notice of determination under clause 29.2.2 or clause 29.2.3 shall not be given unreasonably of vexatiously.

***29.5** In the event of the employment of the Sub-Contractor under the Sub-Contract being determined under clause 29.2 or 29.3 or 29.4 and so long as that employment has not been reinstated then clause 29.6 shall apply.*

***29.6.3** Until after completion of the Sub-Contract Works and the making good of defects as referred to in clause 14.3 the Contractor shall not be bound by any provisions of the Sub-Contract to make any further payment to the Sub-Contractor; provided that clause 29.6.3 shall not be construed so as to prevent the enforcement by the Sub-Contractor or any rights under this Sub-Contract in respect of amounts properly due to be discharged by the Contractor to the Sub-Contractor which the Contractor has unreasonably not discharged and which have accrued 31 days or more before the happening of any of the events listed in clause 29.3.1.*

29.6.4 Upon completion of the Sub-Contract Works and the making good of defects of the kind referred to in clause 14.3 the Sub-Contractor may apply to the Contractor and the Contractor shall pay to the Sub-Contractor the value of any work executed or goods and materials supplied by the Sub-Contractor to the extent that their value has not been included in previous interim payments. The Contractor, in discharging his obligations to pay the Sub-Contractor may deduct therefrom, without prejudice to any other rights of the Contractor and subject to clause 21.3, the amount of any direct loss and/or damage caused to the Contractor by the

determination; or, to the extent that such deduction does not account for the full amount of any such direct loss and/or damage, may recover the difference between the amount deducted and the aforesaid full amount as a debt from the Sub-Contractor.

29.7 *The provisions of clause 29.1 to 29.6 are without prejudice to any other rights or remedies which the Contractor may possess.*

38A Adjudication

38A.1 Clause 38A applies, where pursuant to Article 3, either Party refers any dispute or difference arising under this Sub-Contract to adjudication.

38A.2 The Adjudicator to decide the dispute or difference shall be either an individual agreed by the Parties or, on the application of either party, an individual to be nominated as the Adjudicator by the person named in the Appendix part 8 ("the Nominator") provided that:-

.1 no Adjudicator shall be agreed or nominated under clause 38.A.2.2 or clause 38A.3 who will not execute the Standard Agreement with the Parties and

.2 where either Party has given notice of his intention to refer a dispute to adjudication then

- any agreement by the Parties on the appointment of an Adjudicator must be reached with the object of securing the appointment and of the referral of the dispute or difference to the Adjudicator within 7 days of the date of the notice of intention to refer (see clause 38A.4.1);

- any application to the nominator must be made with the object of securing the appointment of, and the referral of the dispute or difference to, the Adjudicator within 7 days of the date of the notice of intention to refer;

.3 upon agreement by the Parties on the appointment of the Adjudicator or upon receipt by the Parties from the nominator of the name of the nominated Adjudicator the Parties shall thereupon execute with the Adjudicator the JCT Adjudication Agreement

38A..3 If the Adjudicator dies or becomes ill or is unavailable for some other cause and is thus unable to adjudicate on a dispute or difference referred to him, the Parties may either agree upon a person to replace the Adjudicator or either Party may apply to the nominator for the nomination of an adjudicator to adjudicate that dispute or difference; and the Parties shall execute the JCT Adjudication Agreement with the agreed or nominated Adjudicator.

38A..4 .1 When pursuant to Article 3 a Party requires a dispute or difference to be referred to adjudication then that Party shall give notice to the other Party of his intention to refer the dispute or difference, briefly identified in the notice, to adjudication. Within 7 days from the date of such notice or the execution of the JCT Adjudication Agreement by the Adjudicator if later the Party giving the notice of intention shall refer the dispute or difference to the Adjudicator for his decision ("the referral"); and shall include with that referral particulars of the dispute or difference together with a summary of the contentions on which he relies, a statement of the relief or remedy which is sought and any material he wishes the Adjudicator to consider. The referral and its accompanying documentation shall be copied simultaneously to the other Party.

38A.4.2 The referral by a Party with its accompanying documentation to the Adjudicator and the copies thereof to be provided to the other Party shall be given by actual delivery or by FAX or by registered post or recorded delivery. If given by FAX then, for record purposes, the referral and its accompanying documentation must forthwith be sent by first class post or given by actual delivery. If sent by registered post or recorded delivery the referral and its accompanying documentation shall, subject to proof to the contrary, be deemed to have been received 48 hours after the date of posting subject to the exclusion of Sundays and any Public Holiday.

38A.7 .1 The decision of the Adjudicator shall be binding on the Parties until the dispute or difference is finally determined by arbitration or by legal proceedings or by an agreement in writing between the Parties made after the decision of the Adjudicator has been given.

38A.7.2 The Parties shall, without prejudice to their other rights under the Contract, comply with the decisions of the Adjudicator; and the Contractor and the Sub-Contractor shall ensure that the decisions of the Adjudicator are given effect.

38A.7.3 If either Party does not comply with the decision of the Adjudicator the other Party shall be entitled to take proceedings in the Courts to secure such compliance pending any final determination of the referred dispute or difference pursuant to Clause 38A.7.1.

4. Appendix A to the sub-contract contained the following:

Clause 1 - Payment of Valuations

1.1 Payment and Valuations shall be one monthly.

1.2 The Subcontractor shall submit his 'Application for Payment' 3 days prior to the Valuation Date.

1.3 Sindall Construction Ltd. will evaluate the value of works executed by the Subcontractor up to the Valuation Date. (N/A if Subcontractor is Nominated then NSC4 form of subcontract applies and the Quantity Surveyor shall be responsible for the evaluation).

1.4 Section 113 of the Housing Grant, Construction & Regeneration Act 1996 ('Construction Act') shall be incorporated into this Subcontract.

1.5 Payment shall become due no later than 28 says from the date of issue of the Main Contract Payment Certificate applicable to the relevant Valuation Date.

Clause 2 - Adjudication & Dispute Resolution:

2.1 For the avoidance of doubt, the dispute resolution provisions of the subcontract shall remain in full force.

2.2 For Subcontracts where the 'Construction Act' is applicable, the following in respect of Adjudication provisions.

2.2.1 The Adjudicator shall be appointed by the Royal Institute of Chartered Surveyors.

2.2.2 The decision of the Adjudicator is binding until the dispute is finally determined by legal proceedings[.] by arbitration (if the contract provides for Arbitration or the parties otherwise agree to arbitration) or by agreement.

2.2.3 Should any Adjudication action be commenced by the Subcontractor, then the Subcontractor shall be responsible for the full cost of such action.

Thus the conditions forming part of the sub-contract made the payment period 28 days from receipt of the main contract payment certificate.

5. On 10 November 1999 KNS submitted an application (no. 14) for £1,102,422.93. On 29 November 1999, Sindall notified KNS that it considered the gross value of the sub-contract work was to be £908,422.25, later revised to £995,940.25. On 13 December KNS submitted a final account summary (which the adjudicator subsequently decided constituted an application for an interim payment) in the sum of £1,136,076.94. This came to be known as application 15. On 22 December 1999 Sindall notified KNS of its intention to withhold £44,158.52. There was no dispute that Sindall was entitled to do so. By 20 January 2000 KNS thought that it ought to have been paid on its December application (no. 15) and therefore it gave Sindall notice of its intention to suspend performance of the sub-contract works. Sindall countered on 21 January 2000 by warning KNS that it intended to determine its employment under the sub-contract and followed it up by a long letter on 26 January in which it set out its position very clearly. It explained why it thought its valuation of £995,940.25 was correct and showed that there had been an overpayment of £63,579. On 1 February 2000 KNS stopped work so on 4 February 2000 Sindall implemented its notice and determined the employment of KNS under the sub-contract.

6. On 9 March 2000, ie over a month later, KNS served notice of adjudication and made an application to the President of the Royal Institution of Chartered Surveyors for the appointment of an adjudicator. The notice of adjudication was full and apparently carefully drafted by KNS's solicitors. It read, in part:-

5. In accordance with the terms of the sub-contract KNS submitted monthly applications or payment, including application no 14 dated 10th November 1999 in the gross sum of £1,102,422.93 and application no 15 dated 13th December 1999 in the gross sum of £1,136.076.94 (excluding VAT).

6. Wrongfully and in breach of the sub-contract Sindall has failed to value KNS' works in accordance with the terms of the sub-contract and has paid only the net sum of £941,910.49.

7. Accordingly, the balance due to KNS up to and including the amount due under application no 15 is as follows:

Gross value	*£1,136,076.94*
Less discount (2.5%)	*(£28,401.92)*
	£1,107,675.02
Less retention (3%)	*(£33,230.25)*
Net value	*£1,074,444.77*
Less amount paid to date (net of VAT)	*£941,910.49*
Amount due (exclusive of VAT)	*£132,534.28*
VAT @ 17.5%	*£23,193.50*
Amount due (inclusive of VAT)	*£155,727.78*

8. The sum of £155,727.78 together with interest remains due and payable to KNS. No timely and valid notice of intention to withhold payment has been served upon KNS. Further, in breach of the sub-contract, Sindall has failed to notify KNS of the amount of the payment to be made or proposed to be made and the basis of calculation of such payment within the time limited by the terms of the sub-contract or at all.

9. To the extent that Sindall is not precluded from disputing the value of KNS' account, the dispute referred to adjudication under this notice includes the proper measurement and/or valuation of additional or varied works carried out by KNS under the sub-contract.

11. The redress sought by KNS is payment of the sums detailed above together with interest and the fees of the adjudicator, and a declaration that Sindall has undervalued KNS' works carried out pursuant to the sub-contract and wrongfully withheld payment of such sums and of retention.

7. Mr Harvey Mason was appointed adjudicator. He duly received a thirty page document plus voluminous annexes which set out KNS's case at considerable length. Sindall replied, although not at quite the same length, but nevertheless very fully. Amongst the points that Sindall took was that the contract had been terminated. It specifically relied on clause 29.6.3 and said that it was "not bound to make any further payment to KNS. there being no present right in relation to what is alleged to be the December application".

8. The adjudicator informed himself from the considerable documentation and from meetings between the parties. On 12 April 2000 he issued his decision which contained only those reasons that he thought necessary (as of course he was not obliged to give reasons). He arranged his decision very clearly under a number of heads. For present purposes he arrived at the following conclusions:-

1. *KNS's application of 13 December was an application for an interim payment.*
2. *Since the date of payment was governed by the issue of an interim certificate under the main contract, payment was not due until 10 March 2000.*
3. *No payment had been made by Sindall at the date of his decision nor had Sindall notified KNS of the amount of payment as required by the Act.*
4. *The latest date for a withholding notice was 5 March 2000.*
5. *The content of the notice served on 22 December 1999 complied with the requirements of the Act but unless Sindall could show that it had actually incurred additional costs and that they were attributable to KNS it had not in fact incurred any loss.*
6. *Since the final date for payment in respect of KNS's December application was 10 March 2000 it followed that the notice of suspension due to non-payment was premature and as a consequence ineffective.*
7. *Since the suspension was ineffective it followed that Sindall was entitled to take such measures in mitigation as were necessary. However, the sums claimed for administration and supervision would be disallowed for the reasons already given in connection with the withholding notice (which led to £888.46 being disallowed), namely that Sindall had not shown that the costs had actually been incurred.*
8. *Sindall were to pay £4,884.94 made up as set out in appendix A to the adjudication decision:-*

*"**BUILD-UP TO £4,844.94***

KNS	
Gross value of December application	*£1,136,076.94*
Less 2.5% discount	*28,401.92*
	1,107,675.02
Less 3% retention	*33,230.25*
	1,074,444.77
Less paid to date	*941,910.49*
	132,534.28
Sindall	
Withholding notice	*44,158.52*
Non compliant work	*107,143.83*
	151,302.35
Less elements disallowed	*23,613.01*
	127,689.34
	£4,844.94"

9. Following the decision Sindall paid £4,844.94 plus interest. KNS however claim in this action that the adjudicator had no jurisdiction to allow £107,143.85 for "Non compliant work". It claims that the amount that ought to have been awarded was £104,933.52. This is arrived at by selecting figures from the decision so KNS say, rightly, that it is not departing from these findings. From the sum of £107,143.83 KNS deduct £22,724.55 to arrive at £84,419.94, which when added to £4,844.94 comes to £89,264.22. To that sub-total VAT of £15,621.42 is added plus the sum for interest to make £104,933.52.

10. For the purposes of an application under Part 24 it is necessary only that the applicant should establish that there are no or no realistic prospects of success available to the defendant or the claimant, as the case may be. Sindall's application would however have the effect of dismissing the action so I have to be sure that the action would be bound to fail whereas whatever views I may form in relation to KNS's application, if it were to be dismissed the consequences would simply be that Sindall would have an opportunity of establishing its case.

11. Mr Paul Darling QC for Sindall submitted, as a first and preliminary point, with some reason, that no judgment could be given on KNS's case in the form in which it was presented and pleaded. The claim form stated that KNS sought "an order for payment of all sums pursuant due under the Adjudicator's decision". The particulars of claim said in paragraph 21 that Sindall "had wrongfully refused or failed to pay the sum due to the claimant under the Adjudicator's decision". Sindall had paid £4,844.94, plus interest, as required by the decision. The sum of £104,933.52 was not even mentioned in the adjudicator's decision. (Mr Harris for KNS in his skeleton argument sought judgment for £99,328.70.) Sindall therefore maintained that, as a matter of procedure, summary judgment was out of the question.

12. There is clearly no real answer to this objection. The case presented by KNS is not a ordinary one. It requires the adjudicator's decision not just to be construed by reference to the background to and the documents referred to in the decision but also to be dismembered and reconstructed. Both the claim form and the particulars of claim were not well drafted. The amount due "under the adjudicator's decision" is not £104,933.52, but £4,844.94. The application under Part 24 is liable to be dismissed on this ground. On the other hand a party should not suffer unduly as a result of the ineptitude of its legal advisers. The overriding objective set out in Rule 1 of the CPR requires a case to be dealt with justly. The powers of case management enable such mistakes to be overcome (in the absence of evidence that the party had ignored a warning of an objection or had failed to take advantage of putting its house in order. If, for example, it were clear that Sindall had no real prospect of success in defeating KNS's claim on its merits and if KNS had demonstrated that the flaws in the particulars of claim could easily be put right by amendment and if an appropriate application had been made at the hearing (since Sindall's case had been set out in Mr Darling's skeleton argument) then this objection would no longer be effective, except on costs (as Mr Darling accepted). Since Sindall had other objections it was not necessary to decide whether to give Mr Harris time to formulate amendments.

13. Sindall had a number of main points. It maintained that the adjudicator kept to his jurisdiction and had arrived at a decision on the dispute that had been referred to him by KNS. The proceedings were therefore bound to fail. KNS's remedy was to pursue arbitration under Article 3 and clause 38 of DOM/1 in relation to the dispute which provided the only means of correcting any error that the adjudicator might have made. Further Sindall contended that if the adjudicator had made any errors the nature of adjudication was such that the parties were bound by them so they could not be put right so as to give KNS summary judgment. Finally, Sindall relied on clause 29.6.3 which entitled it not to pay KNS any further amounts.

14. It is thus first necessary to determine whether the adjudicator acted without jurisdiction, as suggested by KNS. When the jurisdiction of a person appointed to make a decision under a contract (such as an adjudicator) is called into question, it is always necessary to ascertain with precision what the decision-maker was authorized to do. The events leading up to KNS's notice of 9 March 2000 have to be examined in order to understand what dispute the adjudicator was appointed to resolve. In **Fastrack Contractors Ltd v Morrison Construction Ltd** [2000] BLR 168 at page 176 His Honour Judge Thornton QC gave a clear and full explanation of the nature of the inquiry which I gratefully adopt: "During the course of a construction contract, many claims, heads of claim, issues, contentions, and causes of action will arise. Many of these will be collectively, or individually disputed. When a dispute arises, it may cover one, several or many of

one, some or all of these matters. At any particular moment in time, it will be a question of fact what is in dispute. Thus the "dispute" which may be referred to adjudication is all or part of whatever is in dispute at the moment the referring party first intimates an adjudication reference. 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. A vital and necessary question to be answered, when a jurisdictional challenge is mounted, is: what was actually referred? That requires a careful characterisation of the dispute referred to be made. This exercise will not necessarily be determined solely by the wording of the notice of adjudication since this document, like any commercial document having contractual force, must be construed against the background from which it springs and which will be known to both parties."

15. In questioning the adjudicator's jurisdiction KNS contended that the adjudicator had no authority to deal with some of the grounds upon which Sindall challenged the claims presented by KNS to the adjudicator as Sindall had not given a notice of intention to withhold in respect of the amount for non compliant work which the adjudicator had set against KNS's gross valuation of December 1999. The parties and the adjudicator referred to provisions of the Part II of the Housing Grants Construction and Regeneration Act 1996 (HGCRA). The sections relevant to the issues are sections 110 and 111 which read as follows:

110 (1) Every construction contract shall-

(a) provide an adequate mechanism for determining what payments become due under the contract, and when, and

(b) provide for a final date for payment in relation to any sum which becomes due.

The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

110(2) Every construction contract shall provide for the giving of notice by a party not later than five days after the date on which a payment becomes due from him under the contract, or would have become due if-

(a) the other party had carried out his obligations under the contract, and

(b) no setoff or abatement was permitted by reference to any sum claimed to be due under one or more other contracts, specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount was calculated.

110(3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1) or (2), the relevant provisions of the Scheme for Construction Contracts apply.

111 (1) A party to a construction contract 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.

The notice mentioned in section 110(2) may suffice as a notice of intention to withhold payment if it complies with the requirements of this section.

111(2) To be effective such a notice must specify-

(a) the amount proposed to be withheld and the ground for withholding payment, or

(b) if there is more than one ground, each ground and the amount attributable to it,

and must be given not later than the prescribed period before the final date for payment.

111(3) The parties are free to agree what that prescribed period is to be.

In the absence of such agreement, the period shall be that provided by the Scheme for Construction Contracts.

111(4) Where an effective notice of intention to withhold payment is given, but on the matter being referred to adjudication it is decided that the whole or part of the amount should be paid, the decision shall be construed as requiring payment not later than-

(a) seven days from the date of the decision, or

(b) the date which apart from the notice would have been the final date for payment,

whichever is the later.

16. Section 110 sets out certain basic requirements which must be found in every construction contract (as defined by the Act) made after 1 May 1998. If or to the extent that they are not included in a contract then the default provisions of the Scheme apply as implied terms of the contract (see sections 110(3) and 114(4)). DOM/1 meets these requirements. Accordingly the provisions of section 110 are no longer relevant. The terms of sub-contract are the material provisions. On the other hand there is no requirement to incorporate the provisions of section 111 in a construction contract although the parties are entitled to agree on the prescribed period. Thus DOM/1 states the period to be 5 days and sensibly repeats section 111 in clause 21.3.2. If this clause were to conflict with the provisions of section 111 the latter would prevail so it is understandable (if unnecessary) if the section is referred to. With this warning in mind I shall however prefer to use the sub-contract.

17. Clause 21.3 (read with clause 21.4 and the additional sub-contract provisions in Appendix A) provides that on the valuation dates the contractor is to notify the sub-contractor of (1) the amount of the interim payment due to the sub-contractor as the value of work properly executed (and materials etc) and how it is calculated; (2) the amount of any deduction for any payment due by the sub-contractor and how it is calculated. Accordingly the amount notified as due by the Contractor will be the contractor's view of the true value of work, taking into account any factors that affect the true value of the work, such as the state of completion and proper execution of the work, including whether it was properly carried out or has proved to be defective, ie matters which might qualify in law as entitling a contractor to the defences of abatement or set-off (see for example the well-known restatement by Lord Diplock in **Dawnays v Minter** [1974] AC 689 at page 714)). Any amount that is due by the sub-contractor (eg a contra-charge for labour, plant or materials supplied at the sub-contractor's request) will also be notified as a deduction so as to arrive at the net amount due under clause 21.3.2. Clause 21.3.3, in giving effect to section 111, entitles the contractor not to pay that amount to the sub-contractor in so far there are grounds for withholding it or part of it or for making a deduction from it provided that an effective notice is given, ie one which complies with section 111 (and with any additional condition precedent that may be included in the contract). Section 111(1) makes it clear that a notice of the kind required by section 110 (ie that provided by clause 21.3.2.2) may suffice, but of course the contractor is entitled to give another notice (in order to ensure that there is an effective notice) or to give a notice where none had previously been given. The term withhold is thus used in section 111 to cover both the situation where in arriving a valuation the contractor had not taken account of a countervailing factor as well as the situation where there is to be reduction in or deduction from an amount that had been declared or thought to be due. In the former case the word "withhold" may not always be correct for one cannot withhold what is not due.

18. Thus by the time that KNS gave its notice of adjudication there was plainly a dispute about the valuation of the work. Sindall's valuation did not agree with KNS's November application. On 22 December 1999 it had issued a notice stating that it intended to withhold £44,158 (which if implemented would have resulted in nothing being paid to KNS). Although Sindall had not treated KNS's December application as an application for a interim payment it had made it clear in its letter of 26 January 2000 that nothing more was due to KNS so that apart from the question of timing the requirements of clause 21.3.2.1 had evidently been observed. KNS had nevertheless suspended work on the grounds that by February 2000 it ought to have been paid. Sindall had determined the employment of KNS. On the face of it, if Sindall were right, no further payments were then due, unless of course they fell within the proviso at the end of clause 29.6.3 which begins: *"Until after completion of the Sub-Contract Works and the making good of defects as referred to in clause 14.3 the Contractor shall not be bound by any provisions of the Sub-Contract to make any further payment to the Sub-Contractor.. "* .

19. Clause 38A fulfils Article 3.1: *"If any dispute or difference arises under the Sub-Contract either Party may refer it to adjudication in accordance with clause 38A"*. A notice of intention to refer a dispute to adjudication has two purposes: it notifies the other party to the contract of the dispute, which, although it is to be *"briefly identified in the notice"* (see clause 38A.4.1), must nevertheless be identified and it also tells the person agreed to be the adjudicator of the existence of dispute (and thus, for example, of the possibility of having to make time available) or it informs the person or body responsible for making an appointment of the nature of the dispute. This may be important so as to avoid a conflict of interest or in the process of selection of a suitably qualified person & it may also affect the execution of a JCT Adjudication Agreement.

20. I have already mentioned that the notice given pursuant to clause 38A.4.1 was carefully drafted. It was a formal three page document (plus back sheet). Paragraph 6 said: *"Wrongfully and in breach of the sub-contract Sindall has failed to value KNS' works in accordance with the terms of the sub-contract and has paid only the net sum of £941,910.49."*. Paragraph 8 stated: *"The sum of £155,727.78 together with interest remains due and payable to KNS. No timely and valid notice of intention to withhold payment has been served upon KNS. Further, in breach of the sub-contract, Sindall has failed to notify KNS of the amount of the payment to be made or proposed to be made and the basis of calculation of such payment within the time limited by the terms of the sub-contract or at all."* Paragraph 11 sought the following: *"The redress sought by KNS is payment of the sums detailed above together with interest and the fees of the adjudicator, and a declaration that Sindall has undervalued KNS' works carried out pursuant to the sub-contract and wrongfully withheld payment of such sums and of retention."*

21. I have no doubt whatsoever that the effect of this notice was to inform Sindall that KNS not only did not agree with Sindall's treatment of its applications but also that it did not agree with Sindall's letter of 26 January 2000 (in which Sindall had set out at length why no more was to be paid to KNS) and that its claim to redress challenged Sindall's determination of the sub-contract and, with it, any right not to pay KNS whatever might have been due to KNS. Obviously the success of that challenge depended on the time when payment was due to KNS but, in the light of Sindall's actions, allegations that it was in breach of the subcontract and that payment was due could only mean that Sindall could not get the benefit of clause 29.6.3. Quite apart from the requirement to identify the dispute briefly there were presumably reasons why tactically, KNS's solicitors did not wish to bring out all the issues latent within the seemingly simple claim for a amount due on an interim valuation. As Judge Thornton said in **Fastrack**, *"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"*. 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. It takes the risk that its bluff may be called in an unexpected manner. The further documents which come into existence following the notice of adjudication (such as "the referral" which is defined in clause 38A.4..1 of DOM/1) do not cut down or, indeed enlarge, the dispute (unless they contain an agreement so to do). The adjudicator is appointed to decide the dispute which is the subject of the notice and that notice determines his jurisdiction. The adjudicator's jurisdiction does not therefore derive from the further documents (as was suggested by Mr Harris during his argument), although those documents are likely to help the adjudicator to find out what needs to be decided in order to arrive at a conclusion on the dispute. (However I would be surprised if those who were in favour of adjudication as required by the HGCRA contemplated that adjudicators would be presented with page after page of submissions and annexes from the parties' legal or other advisers, as happened in this not untypical case.)

22. It may be convenient at this stage to deal with a submission advanced for KNS which was based in part on an extract from the judgment of His Honour Judge Bowsher QC in **Northern Developments (Cumbria) Ltd v J & J Nichol** [2000] BLR 158. At page 164 Judge Bowsher said: *"For the temporary striking of balances which are contemplated by the Act, there is to be no dispute about any matter not raised in an intention to withhold payment. Accordingly, in my view, the adjudicator had no jurisdiction to consider any matter not raised in the notice of intention to withhold payment in this case."*

    Mr Harris argued that as the adjudicator had apparently reduced the gross valuation by amounts which had not been the subject of an effective notice under clause 21.3.3 (or section 111) the adjudicator had no jurisdiction to do so. This is a misreading of the extract. If a dispute involves a question as to whether or not an effective notice has been given which complies with section 111 and the contract an adjudicator obviously has jurisdiction to investigate and to decide it. If he decides that no effective notice had been given then he has no power to put it right. To that extent only he has no "jurisdiction" to do so since he cannot dispense with a pre-condition to withholding or deducting an amount. His decision may be right or wrong but it will not be without jurisdiction. Here the adjudicator plainly had the jurisdiction to decide whether or not Sindall had given an effective notice and to act on that decision. According to paragraph 14.7 of his decision Sindall did not serve a effective notice for anything other than the £44,158 (which was not in issue) so it is not as if he had erroneously decided that there was an effective notice. His decision however allowed for a reduction of £107,143 (less £22,613) so, in deference to the submissions made for KNS, I shall deal with the question that this application raises: what does the decision represent if it was within his jurisdiction? However I must make it clear that if the sums in question did require an effective notice and if the adjudicator could not have decided that Sindall could withhold or deduct the amounts in question then he may have made an error. That is immaterial since the adjudicator's decision has to be enforced as it stands regardless of such an error so on that basis KNS's application has to be dismissed and that of Sindall allowed.

23. Mr Darling contended that Appendix A to the decision (the Build-Up) was the adjudicator's valuation. I doubt very much if this submission is correct. Appendix A does not look like a valuation. Similarly I do not consider that one can safely conclude that the adjudicator accepted KNS's December figure as the true value of the works, which is an integral part of its case for otherwise it cannot contend for its valuation.

Whilst the adjudicator applied the percentages for discounts and retention (in full, be it noted) to the gross figure his allowance for *"non-compliant work"* might mask matters which would affect the valuation. If the issue were solely whether KNS was right in its interpretation of the decision then they are clearly reasons why Sindall has real prospects of success in putting forward alternative interpretations to those suggested by KNS.

24. Mr Darling was on surer ground in submitting that in trying to read such a decision there could be no severance of whatever the adjudicator decided so as to separate the good from the bad. Mr Harris contended that there could be a severance for otherwise he could not treat the adjudicator's apparent adoption of KNS's gross valuation of £1,136,076 as the adjudicator's valuation, nor could he isolate (in order to discard as ultra vires) the figures of £107,143 and £23,613. He relied on what Dyson J had said in **Bouygues UK Ltd v Dahl-Jensen UK Ltd** [2000] BLR 49 at page 54 (para 25): *"If the mistake was that he decided a dispute that was not referred to him, then his decision was outside his jurisdiction, and of no effect."*
I have already explained why the dispute referred to the adjudicator included any ground open to Sindall which would justify not paying KNS. There may be instances where an adjudicator's jurisdiction is in question and the decision can be severed so that the authorised can be saved and the unauthorised set aside. This is not such a case. There was only one dispute even though it embraced a number of claims or issues. KNS's present case is based on severing parts of the adjudicator's apparent conclusions from others. It is not entitled to do so. Adjudicator's decisions are intended to be provisional and in the nature of best shots on limited material. They are not to be used as a launching pad for satellite litigation designed to obtain what is to be attained by other proceedings, namely the litigation or arbitration that must ensue if the parties cannot resolve their differences with the benefit of the adjudicator's opinion. KNS must therefore accept the whole of this decision and if it does not like it to seek a remedy elsewhere (in the absence of successful negotiation or some other form of ADR). Furthermore I do not consider that it is right to try to dismantle and then to reconstruct this decision in the way suggested by KNS for that intrudes on the adjudicator's area of decision-making. Mr Mason understandably and properly said that he had not set out all his reasons. Had he done so he might well have explained why a certain course was not in accordance with his thinking. In addition the parties have to accept the decision "warts and all"; they cannot come to the court to have a decision revised to excise what was unwanted and to replace it with what was is or was thought to be right, unless the court is the ultimate tribunal. This decision is a decision on whether Sindall was by March 2000 right not to pay KNS any more money. A party cannot pick amongst the reasons so as to characterise parts as unjustified and therefore made without jurisdiction. It is simplistic to say that a decision-maker is not authorised to make mistakes. It does not follow that every error or mistake falls outside the decision-maker's jurisdiction. Errors of fact and judgment (and even of law) are an inevitable risk of any decision-making process but if it is to be binding, even temporarily, the parties have to accept the risk of such errors. If the decision is erroneous but within the authority granted a party has to accept the result.

25. I do not consider that the adjudicator exceeded his jurisdiction (nor do I consider that it has been shown that he made any significant mistake). In my judgment Sindall is right in reading the decision as a vindication of its decision to determine KNS's employment and not to pay the amounts claimed by KNS. The adjudicator found that although KNS was entitled to a further interim valuation, it had no right to a further payment at any of the times that it sought one, threatened to suspend work and did suspend work. Under the sub-contract payment was governed by the issue of interim certificates under the main contract. Thus the adjudicator concluded that payment was not due until 10 March. He further decided that "the notice of suspension due to non-payment was premature and as a consequence, ineffective" since KNS had no right to payment on 20 January (the date of the notice) or 1 February 2000 (the date of suspension). For the present the parties have to accept these conclusions. They seem to me to be right. The adjudicator then decided that Sindall was entitled to the amounts claimed by it but he reduced them since he was not satisfied that it had actually incurred £23,613.01 in respect of administration charges, presumably because of the reference to *"direct loss and/or damage ..* caused to the Contractor in clause 29.6.4. Although Sindall may be able to question that adjustment either in fact or in law, the adjudicator's decision is otherwise entirely consistent with the further conclusion that because KNS's notice of suspension was ineffective, its suspension was unjustified and Sindall was right to determine KNS's employment. Under Clause 29.6.3

Sindall is not obliged to *"make any further payment"* to KNS and is entitled to recover its direct loss and damage from any payments that may be made. Clause 29.6.4 requires the sub-contractor *"upon completion of the Sub-contract Works and the making good of defects... "* to apply for payment and for the contractor to pay. If section 111 applies (which I doubt since clause 29.6 is part of a typical self-contained code applicable when the sub-contractor is in serious and irreparable default) then that is the time when notice of intention to withhold might be given. There was therefore no need to give a notice in respect of the sums allowed by the adjudicator. The adjudicator appears prudently to have anticipated the inevitable. However the adjudicator decided that there should be a payment which is to me the only apparently inexplicable part of his decision in that clause 29.6.3 gives a contractor the right to defer further payment *"until after completion of the Sub-contract Works and the making good of defects"*. Whilst one might understand a decision based on implicit conclusions that the sub-contract works were effectively complete and that Sindall had claimed all that it could ever recover, clause 29.6.3 postpones the final reckoning to the time when defects have been made good (which had not arrived - the adjudicator noted that even practical completion for the M & E works had not taken place and allowed 3% retention, a rate accepted by KNS in its claim in these proceedings). However even if the adjudicator was in error Sindall could not rely on that error to avoid payment and indeed has paid the amount awarded. I mention this apparent flaw because it might conceivably lead to the conclusion that Sindall's case did not disclose real prospects of success. In my judgment the decision of the adjudicator was therefore a decision on the dispute referred to him, namely was £155,727.78 due to KNS? and within his jurisdiction. That dispute included Sindall's claim that it had lawfully determined the employment of KNS and was entitled to the benefit of clauses 29.6.3 and 29.6.4. That was apparently upheld by the adjudicator. The answer may not to be the liking of KNS but it was a possible consequence of the dispute referred by its notice of adjudication.

26. This action was therefore misconceived and was bound to fail so not only is KNS not entitled to summary judgment but Sindall is plainly entitled to summary judgment against KNS. This case demonstrates the advantages of the extension of the right to summary judgment to a defendant against a claimant. It would be entirely inconsistent with the overriding objective, the powers of case management and the reforming objectives of the CPR to have to permit an action of this kind to proceed to some fuller trial, when, thanks to the comprehensive arguments of the advocates for both parties, all relevant issues have been fully explored. It would be a waste of money and time to permit this an action to proceed further. Obviously the dismissal of this action does not prejudice either party should the underlying disputes be referred to arbitration or come to the court.

27. Finally, Mr Darling submitted that even if KNS had had some entitlement under the decision to a further interim payment consequent on its December application, as claimed by KNS, it would still have had realistic prospects of success in defending the action on the grounds that KNS had unlawfully suspended the work and that Sindall had been entitled to terminate its employment with ensuing rights not to pay under clause 29.6.3. Mr Harris submitted that when an adjudicator decided that an amount had to be paid, it had to be paid, notwithstanding, it seemed, any provision in the sub-contract. Sindall's case presupposes, amongst other things, that in some way one ignores the adjudicator's conclusions, that the dispute had to be back-dated, as it were, to the period before KNS gave notice of intention to suspend, that in some way KNS acquired some right to payment that might be defeated by the effect in law of clause 29.6.3 and the subsequent events which triggered termination, and that the periods involved did not exempt KNS from the effect of clause 29.6.3 (see the reference to 31 days). I find it very difficult indeed to construct a scenario based on the facts of this case which might permit Sindall to raise the essential point upon which Mr Harris joined issue, namely the effect of clause 29.6.3 on an adjudicator's decision.

28. Mr Harris did not shrink from the consequences of his submission. To take an extreme instance, it would mean that in the event of an insolvency payment in full would have to be made to the liquidator, despite the clear wording of clause 29.6.3, with no prospect of recovery of that amount whether as an overpayment or by way of loss or damage under clause 29.6.4 except as an unsecured creditor. Seen as a contractual intention this result would be devoid of any commercial sense and absurd, just as it would be if the there had been a termination for culpable default. In my judgment the answer is clear. Clause 38A.7.2 expressly provides that "the parties shall, without prejudice to their other rights under the Contract, comply with decisions of the Adjudicator...." (my emphasis). Therefore other rights under the contract which were not

the subject of the decision remain available to the relevant party. If therefore by the time an adjudicator makes a decision requiring payment by a party the contract has been lawfully terminated by that party (or that party has real prospects of success in supporting that termination) or some other event has occurred which under the contract entitles a party not to pay then the amount required to be paid by the decision does not have to be paid. If the issue has not by then become a dispute and has been referred to adjudication (when the outcome will have to await that further decision) the aggrieved party may ask the court to enforce the decision (under clause 38A.7.3) and if an application is made under Rule 24 of the CPR the court will decide whether the defendant has real prospects of success in sustaining a case based on the events in question. In addition the latter part of clause 29.6.3 contains an express provision designed to ensure that a contractor does not abuse its right not to pay until completion. There is nothing in the Act to suggest that, for example, section 111(4) means that a decision that a payment should be made, notwithstanding an effective notice of intention to withhold payment, overrides the parties' other contractual rights. An adjudicator is appointed to decide whether in the circumstances of the dispute a particular right exists and should be enforced. Unless the parties specifically agree, an adjudicator is not appointed to adapt the terms of the contract or to vary, add to take away from the terms of the contract. An adjudicator's powers are limited to those conferred by the contract and thus no more than those of a contract administrator, such as an architect, engineer or surveyor, when entrusted with the resolution of disputes. Their role is to apply the terms of the contract. An adjudicator does the same, but decisions of an adjudicator are now more immediately enforceable pending the result of litigation or arbitration. Any other interpretation would also mean that a party who, albeit apparently wrongly, questioned the existence or ambit of its obligations under the contract so that an adjudicator's decision was against it, would be worse off as a result for if it had not done so it would undoubtedly have retained its other rights under the contract. Accordingly if it had been necessary to do so, KNS's application would have been dismissed on this ground and directions given for the further conduct of the proceedings.

29. For the principal reasons KNS's application is dismissed and Sindall's application is allowed. KNS will pay the costs of the action, including Sindall's application. In accordance with the arrangements made at the hearing the parties have made submissions as to Sindall's costs so that they may be summarily assessed. Sindall's solicitors warned KNS's solicitors that Sindall were successful costs on an indemnity basis would be sought as the action was misconceived. They were right to do so, although I shall not assess costs on that basis. However apart for the figures for time spent on attendances (which appear to me to be rather high and should be reduced by about £1,000) the remaining costs appear to me be reasonably and properly incurred (and are also in line with the statement of costs prepared for the claimant). I therefore assess the defendant's costs at £13,250.

Philip Harris of Merricks appeared for the claimant.
Paul Darling QC appeared for the defendant, instructed by Fenwick Elliott.