JUDGMENT : HIS HONOUR JUDGE THORNTON : TCC. 21st June 2000

1. There is before the court an application for an injunction with, or as an alternative, declarations relating to an adjudication, or potential adjudication, between the claimant and the defendant arising out of work being carried out in connection with the Norfolk & Norwich Millennium Project. The work is extensive and involves work to the value of in excess of £4 million. The difference or dispute that I am concerned with arises out of the method of valuing significant parts of that work. I have not had placed before me any significant details of the nature of the dispute since they are not, for the purposes of the application that I am concerned with, material, save to the extent, on the claimant's side, that it is contended that the disputes involve or arise out of a disagreement between the parties as to the full extent of the terms of, and documents incorporated into, the contractual relationship between them.

2. It is accepted by both parties that there is a contractual relationship and that that contractual relationship is, for the purpose of the Housing Grants Construction Regeneration Act 1996, a construction contract. However, certainly for the purposes of this application, the claimant points to a lack of agreement as to the way that that construction contract came into being and as to the full extent of the documents that were incorporated into it.

3. The defendant has purported to exercise a contractual entitlement that it contends it has to have appointed an adjudicator pursuant to what it contends is a part of the contractual relationship between the parties; namely, clause 38(a) of the DOM/1 1998 Edition of the JCT standard conditions. The 1998 Edition of the DOM/1 conditions, it is accepted by the parties, is industry shorthand for the standard form of subcontract issued as one of the JCT family of contracts for use in subcontractual relationships, which was first published in 1980, was then the subject of a series of amendments and was then reprinted in 1998 and reissued and has been the subject of further amendments. For convenience, that reissued version of the DOM/1 conditions is referred to as the "1998 Edition". It is important to refer to that series of amendments to and revisions of, the DOM/1 conditions because the 1998 reissue, so far as it effects adjudication, has omitted a significant adjudication provision contained in the 1980 Edition and has inserted a new clause 38(a), also dealing with adjudication; a change brought about by the coming into force of the Adjudication Scheme provided for by the Housing Grants Construction Regeneration Act. It is that revised Adjudication Scheme contained in the 1998 reissued version of DOM/1 that the defendant accepts formed part of the contractual relationship between it and the claimant under which, it is contended, an adjudicator has been validly appointed.

4. The claimant contends that, first of all, in the absence of any clear agreement or finding as to the full extent of the contract between the parties (in the context of the differences between these parties) it is not open to seek either statutory or contractual adjudication. However, failing that, if contractual or statutory adjudication is possible, there are two bars to what has presently been achieved. What has presently been achieved, as the defendant sees it, is the appointment of a Mr Wakefield by the RICS (which is an appointing body for the purpose of statutory adjudications and the appointing body provided for by clause 38 (a) of DOM/1) and Mr Wakefield has already embarked, as the defendant contends, on an adjudication which, given the terms of the Act, must be completed within 28 days. The parties accept that, if a valid appointment of Mr Wakefield has already occurred, the effective date for the commencement of the 28 day period is 12th June.

5. However, returning to the claimant's position, it is contended that there are two objections that they are entitled to maintain to Mr Wakefield continuing to act as adjudicator, both of which go to his jurisdiction; namely, to the validity of his appointment. The first is that the parties have agreed a clause 41 which is an add-on tailored by the claimant which provides for - and I summarise - mandatory mediation prior to any adjudication procedure being commenced. Since it is contended that that procedure has not yet been followed, the conclusion is drawn that Mr Wakefield's appointment was premature and is, effectively, a nullity.

6. The second contention is that, if it was open for an adjudicator to be appointed because the clause 41 point is no longer able to be taken or is not a good point at all, the parties have agreed on a named

adjudicator, a Mr Brewer, who is to be appointed in relation to any dispute arising between the parties under this contract, and it is only Mr Brewer who may validly be appointed to receive the disputes and to decide them. Hence, Mr Wakefield's appointment on that ground as well is a nullity. I start, therefore, with the provisions of the Housing Grant Construction Regeneration Act, s.104:

"(1) In this Part a 'construction contract' means an agreement with a person for any of the following –

(a) the carrying out of construction operations;

(b) arranging for the carrying out of construction operations by others, whether under sub- contract to him or otherwise;

(c) providing his own labour, or the labour of others, for the carrying out of construction operations.

(2) References in this Part to a construction contract include an agreement -

(b) to do architectural, design, or surveyingwork,

(c) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape,

in relation to construction operations ..."

7. Section 105(1) states:

"In this Part 'construction operations' means, subject as follows, operations of any of the following descriptions -

(a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);

(b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;

(c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;

(d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;

(e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works;

(f) painting or decorating the internal or external surfaces of any building or structure."

8. Section 107 states:

"(1) The provisions of this Part apply only where the construction contract is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing. The expressions 'agreement', 'agree' and 'agreed' shall be construed accordingly.

(2) There is an agreement in writing

(a) if the agreement is made in writing (whether or not it is signed by the parties),

(b) if the agreement is made by exchange of communications in writing, or

(c) if the agreement is evidenced in writing.

(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement."

9. And s.108(1) states: *"A party to a construction contract has the right to refer to a dispute arising under the contract for adjudication under a procedure complying with this section."*

10. So far as the DOM/1 conditions are concerned, I read into the judgment the relevant provisions of clause 38(a).

11. The starting point of the dispute that I must resolve is whether it is necessary for the parties to have agreed, or for the court to determine, what the entire content of the construction contract is before an adjudicator can be appointed, at any rate in relation to the disputes that the defendant seeks to have determined. In doing so, I note, but do not at this stage seek to resolve, potential procedural questions as to whether, even if the claimant succeeds in any one of the three contentions that I must address, it is entitled to injunctive relief, at any rate, prior to the determination of the contract terms between the parties. However, I first turn to the question of whether, as a matter of law, it is necessary for there to be a clearly identified construction contract and all the terms and documents forming part of that

contract before the appointment of an adjudicator can be contemplated, at any rate - and I stress this again - in the context of the type of dispute raised by the defendant.

12. The background to this particular issue is that there is not in existence a bundle of documents sewn together and signed by the parties as - and I use the colloquial language that is often used in this context - the "contractual bible". It does not follow from that, of course, that there is no contract in writing sufficient to entitle adjudication in existence between the parties, or indeed that there is no contract at all. What is relied on as its primary case by the claimant is a letter that is dated 13th April 2000 written by the claimant to the defendant which includes the following: *"We hereby accept your tender as set out in that schedule of documents and correspondence. Accordingly, our relationship will be governed by the conditions of contract referred to in the tender and in particular, the domestic subcontract DOM/1 1980 Edition (as therein amended)."*

13. A schedule of documents numbering 25 items was annexed to, or included with, the letter - one of which is a document which contains what appears to be a list of amendments to the standard DOM/1 conditions. However, there is no record of that letter being accepted in writing by the defendant that has been produced to the court, and the defendant either does not wish at this stage to identify what it contends is the full ambit of the contract or is unable to do so. what the defendant contends is that it accepts that there is a construction contract in existence between the parties, that that incorporates clause 38(a), and hence, by necessary inference, that it incorporates not only that clause but the wider parcel of conditions forming the DOM/1 1998 Edition. 1f and in so far as there are disagreements between the parties as to what else the contract contains, those are, so the defendant contends, disputes or potential disputes that are referable to adjudication and it is their wish and intention that, if and to the extent that any of the disputes that they have identified in their notice of adjudication, involves a need to reach a decision as to whether particular documents were incorporated into the contractual relationship, and particular terms formed part of that relationship, to have that matter, at any rate in the first instance, determined by the adjudicator.

14. I pause to refer to a further matter which I regard as not requiring determination today. The claimant not only rejects the premise of that contention but, in addition, contends that, even if it is open to the defendant to have appointed an adjudicator, the adjudicator, although he clearly can decide disputes, cannot decide what the terms of the contract are, since that is not relief encompassed by the range of decisions open to the adjudicator. It seems to me that that contention, which goes not to the jurisdiction of the appointment of the adjudicator but as to the ambit of the disputes that he can decide once appointed, is a matter that, if it arises at all, should arise in the context of the adjudication itself and, if an adverse decision on such what I might loosely call "internal" jurisdictional disputes is received by the claimant, then the appropriate time to take that question is by way of resisting enforcement proceedings at a later stage. At this stage, as I see it, I am solely concerned with threshold jurisdictional questions relating to the ability to set in train an adjudication process at all.

15. In order to resolve this question, I take as my starting point the words of the statute, because this is a statutory scheme, even if there is a contractual underpinning of that scheme. Section 108(1) is, as I see it, clear and unqualified in its terms: "A party to a construction contract has the right to refer a dispute arising under the contract for adjudication ..."

16. Therefore, for there to be an adjudication pursuant to a party's statutory entitlement, it must be shown that there is: (1) a construction contract; (2) a dispute and (3) a dispute that arises under the contract. If a party can satisfy a court of those three preconditions, then it has shown that it has the right to have an adjudicator appointed.

17. What is undoubtedly the case here is that the parties have accepted that there is in existence a construction contract which contains clause 38(a). I say it is accepted because that is the basis of the claimant's primary case; it puts forward the letter of 13th April and the documents that are referred to in that letter as the contract and that was met, certainly in submission to the court today by Mr Hughes by the response of the defendant that it accepts that there is a construction contract with that clause forming part of it. Mr Goddard, for the claimant, contends that that is not sufficient because, at any rate in a conceptual sense, the parties have not finalised an agreed position that there is one, and

only one, contract in existence between the parties containing that particular clause, because it is apparent that the contract (by which is meant all the terms and documents forming the contract) contended for by the claimant is different from, or at any rate is not identical to, the contract (meaning again the terms and documents forming the contractual relationship) contended for by the defendant and that it is not possible in relation to a dispute arising as to the as applicability of s.108 to, Mr Goddard put it, "cherry-pick" and for the defendant to alight upon one core term of the different contracts being contended for (that is to say an adjudication clause which, as it happens, is in identical terms in each of the two versions of the contract contended for) and for the defendant to say, gleefully, *"Well, there is a construction contract, it contains on any view as a minimum a clause entitling me to refer disputes to adjudication, which is common to both versions, and everything else as to the terms and content of the contract, if not agreed, is or is capable of giving rise to a dispute under the contract."*

18. Mr Hughes contends that that is exactly what the statute entitles the respondent to contend for. A dispute as to whether a particular document is a contractual document in an agreed contractual relationship is as much a dispute under the contract as is a dispute as to what a particular term in that document means, as to whether there is an ambiguity in the terms of the documents or as to the way in which effect should be given to valuation machinery or other machinery of a contractual kind provided for in the documents. The statute does not say, *"A party to a construction contract, all of whose terms have been agreed and defined has a right to refer a dispute arising under the contract for adjudication."* It merely, in an unqualified statement, provides an entitlement to adjudication to a dispute, so long as there is in existence a construction contract.

19. In support of that contention I was referred to an unreported judgment of Judge Gilliland sitting in the Technology and Construction Court in Manchester on 12 April 2000. The report - and I make no criticism or complaint of this - had been prepared by a solicitor who was acting for one of the parties and who was in court on that occasion. So, without in any way attempting to subvert or undermine the accuracy of the report or the relevance of the decision to this case, I feel that it is not appropriate to refer to that judgment further, particularly as Mr Goddard would wish to distinguish it if it was to be relied on in argument. Since it is a decision of a judge of coordinate jurisdiction to myself, sitting in the same court and only recently decided, it seems to me that it is appropriate for me to reach my own conclusion on the wording and effect of s.108 as applicable to this case.

20. Approaching the question as a matter of construction, I am clear that Mr Hughes' construction of s.108 is the correct one. This statutory scheme, which is unprecedented and novel in this country (although subsequently followed in some respects in the education field in relation to disputes involving admission and expulsion from schools) was intended, as is well known, to provide for the first time parties with a rapid, albeit interim, but binding, means of resolving disputes holding up payment within the construction industry at each tier of the often lengthy construction chain. In those circumstances, it is to be expected that the width and ambit of this statutory structure would be extensive. I therefore approach the question of construction of s.108(1) from the standpoint that it is both part of the background to the Act and the apparent wording of the Act itself that it is wide in its ambit and extensive in its effect.

21. In those circumstances, there seems little to support a limited construction of the words "construction contract" and to give those words the meaning of - I paraphrase a possible meaning that would accord with Mr Goddard's suggested construction along these lines: "A construction contract, all of whose terms, including any documents incorporated into it, have been agreed or defined." That, it seems to me, is an unnecessary, and indeed impermissible, gloss to place upon the words used.

22. Thus, so long as it is either established or agreed that there is a contract in existence between the parties, that that is a construction contract and, if a party wishes to rely upon a contractual provision for adjudication as opposed to the fallback statutory provision, an agreed adjudication clause encompassed within that construction contract, that is sufficient for the purpose of the Act, and any other dispute as to the terms of the construction contract is as much a dispute arising under the contract as would be a dispute as to the working through of the terms, including the working through of any terms as to the valuation machinery.

23. I conclude, therefore, that, in principle, the defendant is entitled to an adjudication so long as a dispute has arisen and so long as it is not caught by any precondition to adjudication provided for by the parties that is enforceable. I therefore turn to that question.

24. I referred earlier to the existence of a tailor-made clause 41 providing for mediation. That is contained in, as I have already indicated, one of the documents annexed to the letter of 13th April, and the defendant, again without accepting that the schedule in its entirety with all the documents that are referred to formed part of the contractual relationship between the parties, accepts that that particular clause is one that has been incorporated into the construction contract in question. I should, therefore, first refer to the clause:

> *"41.1 Every effort shall be made by both parties to resolve any difference between them but if this appears impossible the parties shall seek the assistance of a Mediator to attempt to resolve such differences as quickly and amicably as possible.*
>
> *41.2 The parties shall not resort to adjudication or arbitration (save in the case where arbitration arises out of the dissatisfaction of either party with any decision of an Adjudicator) in accordance with this clause unless informal attempts to reach a settlement by way of mediation under this clause have been unsuccessful.*
>
> *41.3 If no settlement has been reached within six weeks of the first appointment of or attempt to appoint a Mediator the mediation shall be deemed to have been unsuccessful.*
>
> *41.4 If a difference should arise between the Contractor and the Employer in connection with or arising out of this Contract and the mediation required under the terms of this clause shall have been unsuccessful, it shall be deemed a dispute. Should such a dispute arise prior to completion or alleged completion or abandonment of the Project or determination of the Contract it shall be settled in accordance with clauses 41A, 41B or 41C as appropriate."*

25. It is noteworthy that, if this clause has any effect, it can only do so if, first of all, the difference that is referred to in the clause has ripened into a dispute. Until that occurs, and it only occurs when the mediation provided for has been unsuccessful, then the clause envisages that what was previously a difference then becomes a deemed dispute.

26. It is also noticeable that the clause is intended to be an adjunct to the JCT main contract conditions contained in the JCT 1980 contract. That is clear from the first page of the document of which this particular provision forms part and it is clear as one goes through the document that it actually lists a whole series of different amendments to different clauses of that main contract. The incorporation of amendments to the main contract (the claimant being a main contractor and the defendant a subcontractor) shows that there is intended by the parties - and this was accepted by both parties - to be a carrying down into the subcontract of the contractual provisions of the main contract. I was invited to construe clause 41 as if it was to be found in a set of conditions that included an adjudication clause in similar terms to clause 38 in the DOM/1 conditions. That would make sense, as I see it, since clause 41 is headed, *"Settlement of disputes - Adjudication - Arbitration - Legal Proceedings."* It clearly distinguishes between differences and disputes, and it is, as I see it, intended to be an adjunct to that earlier provision - earlier in the sense of appearing ahead of it physically or geographically in the contract conditions (not earlier in a temporal sense).

27. I therefore regard the clause as one that should be read with the adjudication clause. In doing so, I therefore note that there is an immediately apparent conflict between the adjudication clause, as read in conjunction with s.108 of the Act, and clause 41; since s.108 provides that, *"A party to a construction contract has the right to refer a dispute arising under the contract for adjudication"* - and that for this purpose "dispute" includes any difference. So that, if there is a provision which apparently entitles a party to an immediate right to adjudication of a dispute and difference, followed by a clause in which the parties purport to require differences to be mediated before they become disputes and then for the dispute to be adjudicated if the mediation is unsuccessful, there is an obvious conflict between the two provisions; since the adjudication entitlement would appear to arise at the moment when clause 41 envisages that the mediation process (the suggested precondition to adjudication) is to start.

28. I should also observe that the particulars of claim in these proceedings plead that a dispute has arisen between the parties as to the interpretation of the subcontract conditions. Mr Hughes contends that the claimant has come to this court to make an application on the basis that a dispute has already arisen, and that it is not, or should not, be open to the claimant to seek to argue that no dispute for the purpose of clause 41 has arisen when it has already contended in its particulars of claim that a dispute has arisen.

29. Mr Goddard submitted that the word "dispute" in the particulars of claim was not intended to have the same formal and strict sense as the word "dispute" is found in s.108 or in clause 41 (the mediation clause). I would be reluctant, in relation to proceedings that have inevitably had to be started and prepared with considerable (and commendable) haste, to decade this significant question by reference to what might on analysis prove to have been an over-hasty use by the pleader of the word "dispute". Therefore, although I see considerable force in Mr Hughes' submission, I prefer to decide the point by reference to the words of the statute. For reasons similar to those already given, it seems to me that Mr Hughes' submission that the effect of the claimant's contention would be to narrow the statutory entitlement to adjudication, is correct.

30. he defendant, if its contention is correct, is, as I see it, forced to read s.108(1) as if it read, *"A party to a construction contract has a right to refer a dispute arising under the contract for adjudication (including any difference) if, but only if, any contractually agreed pre-adjudication procedure has been complied with in relation to that dispute or difference"* - thereby postponing the point in time when the adjudication procedure may start. It may be a short period of time since, in this case, six weeks is the minimum mediation period envisaged by clause 41. Nonetheless, it is a postponement of the right to refer a dispute to adjudication which, as I see it, is not found by the language of s.108. In those circumstances, whatever may or may not have been the attempts to proceed with a mediation, it seems to me that, to give effect to clause 41 by stopping the adjudication on the grounds that clause 41 was not complied with, would be to depart from the statutory unqualified entitlement to an adjudication.

31. Mr Hughes informed me that, if it needed to be resolved, the defendant would wish to put evidence before the court that it had complied with whatever contractual obligations were imposed on it by clause 41 in any event and that, therefore, the precondition had been satisfied and, furthermore, would wish to contend that, on the evidence of what had actually occurred between the parties, the claimant had waived or lost its entitlement to rely on the precondition of mediation since it first took the point that it was entitled to mediation and seeking to appoint a mediator some days after the adjudicator had actually been appointed. I see some force in both contentions but, of course, they have not been fully developed by either party before me and I would have not been able to decide those questions today given the presently reduced amount of evidence that has been put before the court by each party. I therefore do not make any finding on either of those factually based issues.

32. However, I am clear in my mind that, since clause 41, if it has the meaning contended for by the defendant, would fetter the unqualified entitlement to an adjudication provided for by the Act, the claimant would not be entitled to injunctive relief, even if there had been a complete failure by the defendant to comply with the requirements of mediation provided for in clause 41.

33. I therefore turn to the third question, namely whether, as is contended for by the defendant, Mr Wakefield has already been validly appointed. The claimant's submission is to the effect that the parties have agreed on Mr Brewer as the adjudicator and it is only he who may be appointed. This contention relies on a different provision of the contract, namely a different document that provides a number of further amendments, this time to DOM/1, including one found under the heading, *"Appendix Part 8"*, which reads: *"The Adjudicator is ... The Trustee--Stakeholder is ..."*

34. It is clear that, if the first paragraph of that provision means that the parties have agreed that any adjudicator appointed under clause 38(a) is to be Mr Brewer, there is in existence a potentially contractually enforceable agreement that Mr Brewer and no-one else is to be the adjudicator.

35. It is also clear that what this provision is intending to to do is to amend the DOM/1 1998 conditions. It is also clear, as can be seen by a rapid comparison between that contract and its predecessor, the 1980 Conditions (in their unrevised form) that the draughtsman of this document, when reaching Appendix Part 8, had in mind the provisions of the unamended DOM/1 1980 Edition, because clause 24 was the adjudication clause in that form, a clause which was limited to adjudication with regard to a right to set-off. Clause 24.1.2 provided for the parties to agree on the identity of the adjudicator and then clause 24 contained a trustee stakeholder provision in clause 24.3.2 relating to the holding of any monies set off which the adjudicator had ruled might be set off.

36. However, Mr Goddard submits that the clear intention of the parties was that this part of the document, along with all the other parts, were intended to amend the DOM/1 1998 conditions and that ready effect to that can be given by reading Appendix Part 8 as if it was a reference to Appendix Part 8 in the 1998 conditions, to read clause 24.1.2 as if was a reference to clause 38(a) and, since there is no trustee stakeholder provision, to give no effect to the second paragraph. He supports that suggested construction by reference, first of all, to the many occasions through the documents, particularly this one, where the parties are referring to the DOM/1 conditions, and, secondly, to the words of Appendix Part 8 of the 1998 Edition, which are as follows:

"The nominator of the Adjudicator shall be the President or a Vice-President or Chairman or a Vice Chairman: Royal Institute of British Architects ; Royal Institution of Chartered Surveyors ; Construction Confederation ; National Specialist Contractors' Council If no nominator is selected, the nominator shall be the President or a Vice-President of the Royal Institution of Chartered Surveyors ...

Footnotes:

[k] Clause 38A provides that when a dispute or difference arises which either party wishes to refer to Adjudication the identity of the Adjudicator is either an individual agreed by the Parties or an individual nominated by one of the bodies named in the Appendix.

However some Parties may wish to name an Adjudicator in the Contract so that he is readily available if either Party wishes to refer a dispute or difference to Adjudication. If the Parties so want then the Adjudicator should be named here and the following amendments to clause 38A should be made:

Clause38A.2 Delete the text and insert:

The Adjudicator to decide the dispute shall be the individual named as the Adjudicator in the Appendix Part 8 with whom the parties have executed the Standard Agreement for the appointment of an Adjudicator issued by the Joint Contracts Tribunal (the 'JCT Adjudication Agreement'); provided that, unless the Parties have otherwise agreed, the individual is not an employee of, or otherwise engaged by, either Party."

37. It can be seen from those words that the parties, by a rapid textual amendment to Appendix Part 8, can provide for a named adjudicator. That is, Mr Goddard contends, exactly what these parties have done.

38. First of all, it is not clear to me that it was accepted by the defendant that this particular provision formed part of the subcontract relationship between the parties. However, I am prepared to decide this application on the basis that this provision was part of the construction contract and that there is no effective dispute that this provision formed part of the contract conditions. It certainly relates to the DOM/1 condition and it has already been agreed, as I indicated, by the defendant that those conditions did form part of the contractual relationship.

39. In those circumstances, there is, as I see it, a potential conflict because there is a reference to clauses in the DOM/1 conditions that have no place in the actual conditions that form part of the contractual relationship between the parties (the reference to the appointment of a Mr Brewer to a position not provided for in clause 24) coupled with what appears to be a clear intention by the parties that the clause 24 procedure will operate because there is reference to a trustee stakeholder, and there is no reference to a trustee stakeholder in clause 38(a) or the 1998 Editions of DOM/1.

40. Therefore, it might, first of all, be a possible construction of the clause that what the parties were intending was to incorporate as an add-on a quite separate tier of adjudication relating to set-off disputes by analogy with the 1980 DOM/1 conditions.

41. Furthermore, the reference to Appendix Part 8, if it be a reference to the DOM/1998 conditions, could be a reference, assuming that the necessary amendments to that appendix had not been made, to the appointing body or appointer of the adjudicator or it could be a reference to the appointee, namely the adjudicator himself.

42. As I see it, although it might well be possible to reach a preferred solution to those questions, the contentions that I have summarised are not sufficiently unarguable or unclear as to be ruled out as possible contenders for the meaning of this clause, and there is, therefore, an ambiguity, or potential ambiguity, namely as to which of those rival contentions effect should be given to.

43. Therefore, as I see it, the court is thrown, as an aid to construction on what, at any rate until recently, used to be called the "contra proferentum" rule - those who seek to purge the legal lexicon of the Latin language have yet to provide us with the modern translation of that verbal coupling. What that rule provides for, in summary, is that, where there is a conflict or ambiguity in a clause that has been drafted by and proffered by one of the parties to the contract and which has been accepted by the other party to the contract, then, whichever of the constructions that is least favourable to the proffering party is the one that the court should adopt. It is clear to me that the least favourable construction of a clause drafted by and proffered by the claimant is that which would treat the reference to Appendix Part 8 and clause 24 as being references to the old DOM/1 conditions, which, since they form no part of the contractual relationship between the parties, is to be regarded as a reference that is of no effect. In other words, I should not give effect to these provisions, leaving it open, if the question ever arose in a different context between these parties, as to whether this is a reference to what I have referred to as "add-on" adjudication procedure provided for by clause 24 to set off disputes.

44. However, so far as any of the disputes or possible disputes are concerned, on that approach to the construction of this appendix, the reference to Mr Brewer therefore is of no effect at all. I therefore conclude that Mr Brewer is not for the purpose of these disputes the agreed adjudicator and that there is, therefore, no named adjudicator.

45. In those circumstances, the defendant was entitled to seek the appointment of an adjudicator. It did just that. The RICS is an appointing body, and appointed Mr Wakefield and the parties have accepted that, on that basis, his appointment dates from 12th June. However, I invited the defendant, before I started my judgment, to indicate whether it would be prepared to agree to the extension of the period within which Mr Wakefield is required to conclude the adjudication. The time limits are tight. There is a 28 day period. As I see it, since the middle of last week the claimant has been concentrating its attention on preparing for this hearing, and I do not regard the application as being one which was mounted in circumstances which should penalise it further in its preparations for the adjudication.

46. The defendant has - and I note this with gratitude - obviated the need for me to consider whether I should grant any interim relief to take account of that hiatus by accepting that the 28 day period should be extended by a period of seven days. It therefore follows, and I record, that, although Mr Wakefield has been validly appointed, it is, by reference to an adjudication, the start date of which was 12th June and the end date of which will be 35 days from that date. However, subject to that clarification or amendment to the adjudication procedure, it follows that the claimant's application for relief, both injunctive and declaratory relief, fails and, subject to hearing from Mr Goddard if any alternative contention is to be advanced, that both the application and the claim should be dismissed.

MR A. GODDARD appeared on behalf of the claimant.
MR HUGHES appeared on behalf of the defendant.