JUDGMENT : HIS HONOUR JUDGE JOHN HICKS QC : 13th January 2000.

Introduction

1. The Claimant, VHE Construction PLC ("VHE"), is the contractor under a construction contract with the Defendant, RBSTB Trust Co. Limited ("RBSTB"), and applies for summary judgment for sums claimed by way of the enforcement of the decisions of two adjudicators appointed under the Housing Grants, Construction and Regeneration Act 1996 ("the Act").

History :

2. On 5 January 1999 RBSTB as employer and VHE as contractor entered into a JCT standard form of building contract with contractor's design, 1981 edition as amended, for ground remediation works at Leamington Spa at a contract sum of £668,044, the dates of possession having been 23 November 1998 for section 1 and 26 October 1998 for section 2, and the dates for completion being 3 January 1999 and 31 January 1999 respectively.

3. The contract contained provisions for interim payments. Clause 30.1.1 provided that interim payments should be made by RBSTB to VHE in accordance with (inter alia) clauses 30.1 to 30.4. By clause 30.1.2 the amount due as an interim payment was to be the gross valuation as referred to (in this instance) in clause 30.2A. Clause 30.2A contained, in its sub-clauses, a detailed code for the computation of the gross valuation. Clause 30.3.1 provided for VHE to make applications for interim payments. Clauses 30.3.3 to 30.3.6 read as follows:

   30.3.3 Not later than five days after receipt of an Application for Payment [RBSTB] shall [give] a written notice specifying the amount of payment proposed to be made in respect of that Application, the basis on which such amount is calculated and to what the amount relates and, subject to clause 30.3.4, shall pay the amount proposed no later than the final date for payment.

   30.3.4 Not later than five days before the final date for payment of an amount due pursuant to clause 30.3.3 [RBSTB] may give a written notice to [VHE] which shall specify any amount proposed to be withheld and/or deducted from that due amount, the grounds for such withholding and/or deduction and the amount of withholding and/or deduction attributable to each ground.

   30.3.5 Where [RBSTB] does not give any written notice pursuant to clause 30.3.3 and/or to clause [RBSTB] shall pay [VHE] the amount stated in the Application for Interim Payment.

   30.3.6 The final date for payment of an amount due in an Interim Payment shall be 14 days from the receipt by [RBSTB] of [VHE's] Application for Interim Payment or within 28 days from the date of receipt by [RBSTB] from [VHE] of a copy of each Application for Interim Payment together with an appropriate VAT invoice .... , whichever is the later.

4. Practical completion of both sections was certified as having taken place on 28 May 1999.

5. On 10 June 1999 VHE submitted application 4 for £883,317.49 plus £154,580.56 VAT, a total of £1,037,898.05.

6. In relation to that application RBSTB served no notice under clause 30.3.3 or 30.3.4. and VHE submitted no VAT invoice within clause 30.3.6.

7. Clause 39A of the contract provided for adjudication in accordance with section 108 of the Act of any dispute or difference referred by either party to such adjudication. Clause 39A complied with the requirements of section 108 and therefore had effect to the exclusion of the statutory scheme which applies under section 108(5) in default of any compliant contractual scheme.

8. On 20 August 1999 VHE served a notice of adjudication which, as summarised in the adjudicator's decision, sought *"full payment for all works, variations and loss and expense detailed and outstanding in application for payment 4"* and other sums. On 23 August Christopher Michael Linnett was appointed to act as adjudicator, on 27 August VHE served a referral and on 10 September RBSTB served a response dated 9 September.

9. Mr Linnett issued his decision on 5 October 1999. He first dealt with and rejected an argument by RBSTB against liability which has not featured in the issues before me, and as to which I need therefore say nothing. He next addressed the issue whether RBSTB was entitled to withhold payment until VHE provided a VAT invoice and decided that it was. He continued: *I accept that [RBSTB is]*

currently under no obligation to pay the sum applied for, but I believe it is incumbent upon me to decide what the position would be if a VAT invoice is issued. I do that by deciding the third and fourth issues.

10. The third issue was whether VHE was automatically entitled to the amount applied for or whether RBSTB was entitled to pay less by relying on rights of abatement or a "proper" assessment under clauses 30.1. and 30.2A. Mr Linnett, having taken leading counsel's advice on that and other questions, decided in conformity with that advice that RBSTB was not entitled to abate or challenge the amount applied for unless the requirements of clause 30.3.3 had been complied with (paragraph 31 of his decision), and found that as they had not VHE would, subject to the decision on the fourth issue, be entitled to the amount applied for within 28 days of the issue of a VAT invoice (paragraph 32).

11. The fourth issue was whether, despite the decision on the third issue that clause 30.3.5 entitled VHE to receive the sum applied for without deduction, Mr Linnett could, as adjudicator, review and revise application 4 so as to reduce it to any lesser sum which he might determine to be the sum referred to in clauses 30.1.2 and 30.2A. His decision, again in conformity with leading counsel's advice, was that he must order payment in full but could, if the notice of referral were wide enough, review the application "and order **repayment**" (his emphasis) once payment had been made. He wrote: *I accept that I must decide (or "order" to use Counsel's words) that payment is due and this is the effect of paragraph 32 above.*

12. Mr Linnett went on to consider whether the referral to him was wide enough to empower him to review or revise the value of the application, so as to amend it to any other sum, and decided that it was not.

13. Finally Mr Linnett considered and rejected submissions by VHE on certain minor issues which do not affect the questions before me.

14. On 7 October 1999 VHE's VAT invoice for the amount of application 4 was received by RBSTB. The period of 28 days from that date was due to expire on 4 November 1999.

15. On 12 October 1999 Mr M.L. Standinger was appointed to act as adjudicator in a second adjudication under clause 39A, initiated by RBSTB. Its notice of referral of 13 October 1999 submitted that the adjudicator had power to open up, review and revise application 4. In the adjudication it sought the following remedies:

    A revision of application 4 to determine, in accordance with clause 30.1.2 .... the properly calculated sum which ought to have been applied for ("the revised sum").

    A peremptory decision that the sum payable under application 4 be reduced to the revised sum, and/or that upon payment by [RBSTB] in respect of application 4 of any sum greater than the revised sum then VHE shall immediately be liable to, and shall, repay to [RBSTB] any difference between the sum paid and the revised sum.

16. In the course of the adjudication Mr Standinger obtained RBSTB's confirmation of his understanding that it was seeking a decision "which works in the following way", namely that he had power to open up, review and revise application 4 and determine the proper sum which ought to have been applied for in accordance with clause 30.1.2 and that (inferentially after having determined such a sum) he had the power: *.... to order repayment of any sum in excess of that which ought properly to have been applied for even though in the meantime a greater sum may have accrued for payment by reason of a lack of challenge to the amount applied for.*

17. As to the merits on a review, should it occur, RBSTB contended for a reduction of application 4 to £109,566.61, including VAT, on various grounds, which did not include any claim to deduct liquidated damages for delay.

18. On 4 November 1999 the 28 days from VHE's VAT invoice expired. There had not been any notice by RBSTB expressed to be given under clause 30.3.4. RBSTB did not pay.

19. On 9 November 1999 Mr Standinger issued his decision. He decided that he had the powers summarised or set out in paragraph 16 above and in exercise of them he determined that the properly calculated sum in accordance with clause 30.1.2 was £254,831.83, including VAT, ("the revised sum") and decided peremptorily, that the sum payable under application 4 be reduced to the revised sum,

and/or that upon payment by [RBSTB] in respect of application 4 of any sum greater than the revised sum then VHE shall immediately be liable to, and shall, repay to [RBSTB] any difference between the sum paid and the revised sum.

20. Clause 24 of the contract dealt with damages for non-completion. Clause 24.1 provided for RBSTB to issue a notice if VHE failed to complete a section of the works by the completion date, and such a notice had been given on 25 February 1999. Clause 24.2.1, omitting irrelevant qualifications and conditions, read: *Subject to the issue of any notice under clause 24.1 [VHE] shall, as [RBSTB] may require in writing .... pay or allow to [RBSTB] liquidated and ascertained damages [at the appropriate rate] for the period between the Completion Date of a Section and the date of practical completion of such Section and [RBSTB] may deduct the same from any monies due or to become due to [VHE] under this Contract .... or [RBSTB] may recover the same from [VHE] as a debt.*

21. RBSTB had not submitted any requirement in writing under clause 24.2.1 at any stage so far recounted. On 11 November 1999 its project managers wrote to VHE on its behalf *"to advise you [RBSTB intends] to deduct Liquidated and Ascertained Damages in accordance with the attached calculation"*. The letter stated that the amount shown would be deducted from any monies due or recovered as a debt. The calculation showed a total sum of £207,857.14. The argument before me was conducted on the basis that that letter was in form a sufficient requirement in writing for the purposes of clause 24.2.1, and I am content to adopt that basis.

22. On 19 November 1999 VHE's solicitors wrote and delivered to RBSTB a letter before action demanding payment of £254,831.83. On the same date RBSTB's solicitors replied by fax that (as was the case) a telegraphic transfer of £46,974.69 had been made by RBSTB that day. It was stated that that took into account a deduction of £207,857.14 for liquidated damages as, arithmetically, it does.

The claim :

23. On 24 November 1999 VHE issued in this court a claim expressed to be for the enforcement of the decisions of both adjudicators, the claim being for a sum of £207,857.14 and interest, including interest on the sum of £883,317.49 (that is, the full amount of application 4, net of VAT) from 4 November to 8 November inclusive.

24. The Particulars of Claim set out briefly the circumstances and outcome of the two adjudications, the submission of the VAT invoice and the payment of £46,974.69. It is alleged, in particular, that the sum of £1,037,898.05 should have been paid by RBSTB to VHE on or before 4 November 1999.

25. An application by VHE for summary judgment was issued on 24 November 1999 and heard on 10 December 1999. This is my reserved judgment on that application.

The statutory provisions for adjudication :

26. The points taken on each side on the application were numerous and detailed, but before I turn to deal with them I find it helpful to consider three matters of more general scope, each of which becomes relevant, and sometimes important, at several stages in the argument.

27. The first concerns the purposes and statutory intention of section 108 of the Act, which establishes the right of a party to a construction contract to refer a dispute arising under the contract for adjudication. For that purpose, more particularly since I did not understand them to be seriously challenged, I need do no more than say that I respectfully agree with and adopt two passages from reported decisions in this court.

28. The first is part of the judgment of Dyson J in **Macob Civil Engineering Ltd v Morrison Construction Ltd** [1999] BLR 92, at page 97: *"The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement .... "*

"Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved."

29. The second comes from the judgment of His Honour Judge Humphrey Lloyd QC in **Outwing Construction Ltd v H Randell & Son Ltd** [1999] BLR 156, at page 160: The overall intention of Parliament is clear: disputes are to go to adjudication and the decision of the adjudicator has to be complied with, pending final determination.

The statutory provisions for payment :

30. The second general matter concerns the purposes, statutory intention and effect of sections 110 and 111 of the Act. Those sections are part of a group dealing with payment under construction contracts.

31. Section 110(1)(b) provides that "every construction contract shall provide for a final date for payment in relation to any sum which becomes due, and that 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." It is not, as I understand it, in dispute that here clause 30.3.6 (paragraph 3 above) complied with that requirement, and I so find. It is to be noted that it is implicit in this provision that (at least unless a nil period can be and is agreed) a sum "becomes due" at an earlier date than the "final date for payment".

32. Section 110(2) reads as follows:

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 set-off or abatement was permitted by reference to any sum claimed 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 the amount was calculated.

It is not, as I understand it, in dispute that here clause 30.3.3 (paragraph 3 above) complied with that requirement, and I so find. It follows that the receipt of an application for payment under clause 30.3.1 was the date on which the relevant payment "became due or would have become due [etc]", in the terminology of section 110.

33. I observe that section 110 operates by requiring there to be certain contractual provisions. There are default provisions which apply if the contract itself does not conform, but if (as here) it does so the statute, in an important sense, drops out of the picture. It is, however, necessary to have the terms of section 110 in mind when construing section 111.

34. Section 111 provides as follows:

(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.
(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.
(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.
(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.

35. Unlike section 110, section 111 has direct application, except in leaving it to the parties to specify the "prescribed period", so that although clause 30.3.4 (paragraph 3 above) closely follows the terms of section 111(2) regard must still be had to the latter, reading "five days" for "the prescribed period" by virtue of section 111(3) and clause 30.3.4.

36. The first subject of dispute as to the effect of section 111 is whether section 111(1) excludes the right to deduct money in exercise of a claim to set-off in the absence of an effective notice of intention to withhold payment. Mr Thomas, for RBSTB, submits that it does not. I am quite clear, not only that it does, but that that is one of its principal purposes. I was not taken to the reports or other preparatory

material leading to the introduction of this part of the Act, nor to anything said in Parliament, but the see-saw of judicial decision, drafting fashion and editorial commentary in this area is familiar to anyone acquainted with construction law, and in my judgment section 111 is directed to providing a definitive resolution of the debate. The words "may not withhold payment" are in my view ample in width to have the effect of excluding set-offs and there is no reason why they should not mean what they say.

37. The other subject of possible dispute is the ambit of section 111(4). Clearly it requires there to have been an effective notice to withhold payment. Mr Furst, for VHE, submits that a further requirement is that the notice must precede the referral and that the "matter" referred to adjudication must include the effect of that notice and the validity of the grounds for withholding payment which it asserts. It may be that that was not challenged by Mr Thomas, but in case of any doubt on that score I record that in my judgment it is correct. The effect of the subsection is that, after there has been an effective notice of intention to withhold and an adjudication, payment cannot be enforced earlier than seven days from the date of the decision. There is no reason why that should be so unless the adjudication relates to the notice. Moreover that is the natural point of reference of the expression "the matter", with its definite article, as a matter of construction.

The effect of adjudication decisions :

38. The third preparatory matter concerns the effect and status of adjudication decisions. It involves two questions. The first is as to the construction and effect of the decisions in this case, and in particular whether they give rise, singly or together, to independent obligations for the payment of money, distinct from the contractual obligations which were the subject of the referrals. The second is not confined to the facts of this case and concerns the status of adjudication decisions which require the payment of money.

39. Mr Linnett's decision, of course, did not create any immediate obligation to pay money, because he accepted RBSTB's submission that it was entitled to withhold payment until VHE provided a VAT invoice. He then, however, in dealing with what he called the third issue, proceeded to decide in the plainest and most unequivocal terms that VHE would be entitled to payment within 28 days of the issue (strictly the receipt) of a VAT invoice (paragraph 10 above). In dealing with the fourth issue he decided that he must "order" payment in full and summarised his conclusion as being that he must decide, or order, that payment was due (paragraph 11 above).

40. Mr Thomas submitted that that decision simply left the contractual provisions to operate so that, as I understand the argument, it amounted to no more than a declaration as to the effect of the relevant contractual provisions in the events which had happened. It would follow, presumably, that in order to obtain any payment under application 4 VHE would have to begin an ordinary action in contract, and that proceedings to secure compliance with the decision would be vacuous.

41. In support of that construction Mr Thomas relied on paragraph 45 of the decision in which, dismissing a claim by VHE for interest, Mr Linnett refers to having decided that "the final date for payment" has not occurred. The inference which Mr Thomas sought to draw was, I take it, that in paragraph 32 Mr Linnett had simply been deciding when the "final date for payment" would, on a certain hypothesis, arrive. But what Mr Linnett was doing in paragraph 45 was, in my view, to recapitulate in summary form his reason for rejecting VHE's claim to immediate payment, which was naturally based on the parties' contractual rights and duties and expressed in contractual terminology; he was not purporting to explain the meaning or effect of the decision which he had reached, which in the matter he was currently dealing with (the dismissal of the interest claim) needed no explanation, and in the matters more material to the issues before me had already been explained in the way described in paragraphs 10, 11 and 39 above.

42. The only other possible pointer to a purely declaratory construction of the decision is the conditional form of the passage quoted in paragraph 9 above: *" .... what the position **would be if** a VAT invoice is issued"* (my emphasis). Even if it is right to attach any significance to that at all, however, which I doubt, it is heavily outweighed by the contrary indications summarised in paragraph 39 above.

43. Looking at the matter more broadly both the statutory purpose of section 108 of the Act, as summarised in paragraphs 28 and 29 above, and the implausibility of the notion that either the parties or the adjudicator intend his decision to be vacuous, suggest that only the clearest indications to that effect in the decision should be permitted to compel such a construction. So far from that being the case here the evidence is predominantly, if not entirely, the other way. I therefore conclude that the effect of Mr Linnett's decision was to require RBSTB to pay the sum of £1,037,898.05 to VHE within 28 days after receipt of the appropriate VAT invoice, that is to say, in the event, by 4 November 1999.

44. It might be argued that Mr Linnett could and should have allowed RBSTB the liberty, by analogy with clause 30.3.4, of serving a notice of withholding or deduction not later than five days before the date for payment under his decision. I do not know whether he was asked to, but the fact is that he did not and that the clear and emphatic terms in which he gave his decisions on the third and fourth of the issues before him exclude any such possibility. Nor have I been invited to interfere, or could have been, in that respect; it is quite clear that the court has no appellate jurisdiction over adjudicators, even when demonstrably mistaken, as I am far from suggesting Mr Linnett was. In that respect I reach my own conclusion, since the decision of Dyson J in **Bouygues UK Ltd v Dahl-Jensen UK Ltd (**unreported, 17 November 1999) was not discussed in argument, but I note that in that case, where the point was crucial, he took the same view.

45. On 4 November 1999, therefore, RBSTB was required by Mr Linnett's decision, and not merely (if at all) by any other term of the contract than clause 39A, to pay £1,037,898.05 to VHE.

46. It is clear that Mr Standinger's decision was not, in the same sense, an independent requirement to pay money, and in so far as any of Mr Thomas' arguments incorporate the tacit assumption that it was I reject them. The relevant facts are set out in paragraphs 15, 16 and 19 above. There is simply nothing in the notice of referral seeking such a remedy and nothing in the decision capable of being construed as such a requirement.

47. Mr Thomas' principal express submission was again that this decision simply left the contractual provisions to operate. It is true that Mr Standinger was in one sense reviewing the content, and thereby arguably altering the effect, of a contractual step, namely the submission by VHE of application 4, as Mr Thomas emphasised in citing the references in the decision to clause 30.1.2. Nevertheless once it has been decided, as it has in paragraph 45 above, that Mr Linnett's decision constituted an independent requirement to pay money, this submission becomes even less sustainable in relation to Mr Standinger's decision than to Mr Linnett's. The starting point for the referral to Mr Standinger, and for any decision he might reach, was the obligation to comply with that requirement. In relation to the mode of recovery of the sum due under application 4 the contractual machinery had already been superseded.

47. I therefore reject Mr Thomas' submission. That leaves open two possible views as to the effect of the decision, already inherent in the dual way in which the notice of referral expressed the remedies sought, a duality repeated in the formal statement of the decision. The first, founded on the opening words ("the sum payable .... be reduced to the revised sum"), is that the sum payable under Mr Linnett's decision was reduced from £1,037,898.05 to £254,831.83. The second, by reference to the second part, is that the sum payable under Mr Linnett's decision remained at £1,037,898.05, but that VHE could not enforce that decision without immediately becoming liable to repay £783,066.22.

48. In my judgment the second is the better view. Mr Standinger had no jurisdiction to set aside, revise or vary Mr Linnett's decision, was never asked to do so, and was conspicuously careful to avoid any form of words which might convey the contrary impression. The obligation under Mr Linnett's decision therefore remained and remains. That conclusion must be clearly distinguished from the practical reality that VHE, not having already enforced Mr Linnett's decision, was now overwhelmingly likely to limit its demand and any proceedings, as it did, to the net sum which it would have retained had payment and repayment been made. Nor is it intended to prejudge the question what would have been the outcome if VHE had sued for the enforcement of Mr Linnett's decision in full and RBSTB had, without challenging that claim in any other way, simply counterclaimed for the enforcement of Mr Standinger's decision and relied upon it by way of set-off.

49. There being therefore, under Mr Linnett's decision, whether technically modified by Mr Standinger's or not, a requirement to pay money, I turn to the second question posed in paragraph 38 above, namely the status of such a decision.

50. The effect of an adjudicator's decision is dealt with by clause 39A.7 of the contract in the following terms:

39A.7.1 The decision of the Adjudicator shall be binding on the Parties until the dispute or difference is finally determined by arbitration or legal proceedings or by an agreement in writing between the Parties made after the decision of the Adjudicator has been given.

39A.7.2 The Parties shall, without prejudice to their other rights under the Contract, comply with the decisions of the Adjudicator; and the Employer and the Contractor shall ensure that the decisions of the Adjudicator are given effect.

39A.7.3 If either Party does not comply with the decision of the Adjudicator the other Party shall be entitled to take legal proceedings to secure such compliance pending any final determination of the referred dispute or difference pursuant to clause 39A.7.1.

51. Clause 39A.7.1 is required by, and substantially follows the terms of, section 108(3) of the Act. It is not, as I understand it, directly concerned with enforcement, but with the relationship between an adjudicator's decision and subsequent arbitration or litigation of the same dispute. It does, however, with the authority of the Act, lay the ground for enforcement by the provision that until final determination of the dispute the decision is binding. The Act does not itself make any provision for enforcement or require the contract to contain terms making such provision in any particular form.

52. Clause 39A.7.2 makes express a contractual obligation on the parties to comply with the decision which might, even in its absence, have been implied from the agreement to refer disputes to adjudication or from clause 39A.7.1. The words "without prejudice" found a submission by RBSTB which I shall consider later.

53. Clause 39A.7.3 is the enforcement provision. What it provides for is legal proceedings "to secure such compliance", that is to say the compliance contractually required by 39A.7.2.

54. I conclude that enforcement proceedings such as these are proceedings to enforce a contractual obligation, namely the obligation to comply with the decision. The decision does not have the status of a judgment, not is there any provision in the Act corresponding to section 66 of the Arbitration Act 1996, under which, by leave of the court, judgment may be entered in terms of an arbitral award, or the award may be enforced in the same manner as a judgment.

55. There is, however, a question whether the obligation to "comply with" a decision which requires the payment of a sum of money has any greater effect than to make that sum a simple debt, for example by excluding certain defences which could be raised in answer to an action on such a debt. I do not believe that that question can usefully be addressed in the abstract, but I shall return to it if it becomes necessary to do so in dealing with specific submissions.

VHE's case :

56. VHE's case is simply that in order to comply with the adjudicators' decisions RBSTB was on 9 November 1999 obliged to pay to VHE, in addition to anything due by way of interest, the capital sum of (at least) £254,831.83, of which it has in fact paid only £46,974.69, leaving £207,857.14 due.

57. On the basis of my consideration in paragraphs 39 to 48 above of the construction and effect of the decisions that must clearly be right, unless there is some ground for a contrary conclusion which I have not yet taken into account. Mr Thomas advanced a number of grounds, and I therefore turn to consider them. I do so in the order in which they impinge upon my narrative of the history and my more detailed examination of the adjudicators' decisions, which departs in some respects from the order in which they appear in Mr Thomas' skeleton argument.

RBSTB's case :

58. I have recorded in paragraphs 6 and 18 above that RBSTB served no notice under clause 30.3.4 of the contract. That is not in dispute so far as concerns any document appearing on its face to be such a

notice, but Mr Thomas submitted that certain other documents had the effect of being notices for the purposes both of clause 30.3.4 and of section 111 of the Act.

59. The first document relied upon for that purpose was RBSTB's response to VHE's referral to Mr Linnett, entitled "submissions and contentions" and dated 9 September 1999. In my view it is clear that that does not assist RBSTB on the present issue, for three reasons:

(a) In the first place, although I assume in RBSTB's favour that a notice under either clause 30.3.4 or section 111 need not be particularly formal or bear any particular label, nevertheless it must recognisably answer to the description in the clause or section, as the case may be. For that purpose it must be addressed to the other party; clause 30.3.4 expressly so requires and section 111 makes no sense without a similar implication. It must also give notice of the giver's proposal (clause 30.3.4) or intention (section 111) to withhold or deduct a specific amount; both provisions expressly so require. The submissions document meets neither requirement.

(b) Secondly the document itself, in paragraph 4.2, expressly states that no clause 30.3.4 notice had been given, or could be in the absence of a prior clause 30.3.3 notice. That is wholly inconsistent with its being itself such a notice.

(c) Thirdly Mr Linnett's decision on his third issue excludes the possibility.

60. It was also part of RBSTB's case that there was an effective notice more than five days before 4 November 1999, constituted by paragraphs 20 and 21 of its notice of referral in the second adjudication, dated 13 October 1999, and that 4 November was the "final date for payment" of application 4 under clause 30.3.6 of the contract. That contention also fails. In the first place, for similar reasons to those given in paragraph 59(a) above, paragraphs 20 and 21 of the notice of referral are incapable of constituting an effective notice within the terms of clause 30.3.4 or section 111, as indeed is the document as a whole. The relevant words in paragraph 20 are "it is [RBSTB's] contention that Application for payment 4 should be revised downwards", and paragraph 21 simply sets out the calculation thus contended for. Secondly, for the reasons given in paragraphs 40 to 43 above, the effect of Mr Linnett's decision was not to leave the contractual machinery to operate undisturbed but to impose a fresh obligation to comply with his decision by paying the full sum within 28 days after receipt of a VAT invoice. Thirdly, for the reasons given in paragraph 44 above, that decision excluded the possibility of a subsequent effective clause 30.3.4 notice.

61. That brings me, in point of time, to Mr Standinger's decision of 9 November 1999. The first submission in relation to that is that no sum could become payable under that decision until a VAT invoice (presumably for £254,831.83) was issued by VHE, which has never happened. There is nothing in that. In the first place it rests either upon the assumption that the decision was one requiring the payment of money, which I have rejected in paragraph 46 above, or upon the contention that the contractual machinery for determining a "final date for payment" was still in place, which I have rejected in paragraph 47 above, or (more likely) upon both. Secondly, although the VAT legislation was not cited, I cannot believe that the only way of dealing with that aspect of the situation was to issue a fresh VAT invoice, which could not in any event be right without there being a credit note cancelling the original invoice. It would, according to standard book-keeping practice, be at least equally appropriate for the creditor to issue a credit note, or the debtor an invoice, for the difference. The former would correspond with the first view of the decision canvassed in paragraph 47 above, and the latter with the second. Neither would set a fresh "final date for payment", even if that part of the contractual machinery were still relevant. RBSTB clearly did not take this point seriously enough to see it as any obstacle to their paying £46,974.69.

62. The next submission was that Mr Standinger's decision was one within section 111(4), so that it "should be construed as requiring payment not later than .... seven days from the date of the decision", namely on 16 November 1999, which thereby became the "final date for payment", thus making the liquidated damages notice of 11 November one given not later than five days before that date and justifying the deduction of the liquidated damages claimed. That also must be rejected. In the first place the decision was not one within section 111(4). As stated in paragraph 37 above, that provision requires there to have been an effective notice to withhold payment preceding the referral and within

the subject-matter of it. I have held that there had been no such notice, and certainly no question as to the validity or effect of any such notice was within the referral. Secondly this submission again rests upon the proposition that the contractual machinery was still in operation, which I have repeatedly rejected. For the reasons given in paragraphs 39 to 48 above the date for payment was 4 November 1999, but even if it were 9 November the liquidated damages notice of 11 November was out of time for the purposes of this submission.

63. Mr Furst submitted that there was a third answer to this point, namely that even if the date for payment were 16 November 1999 and were a "final date for payment" for the purposes of clause 30.3.4 and section 111, a notice on 11 November would be too late, as not meeting the requirement of being given "not later than five days before the final date for payment". He expressly disclaimed, however, any contention that "five days" here means "five clear days". I agree that it does not, but in the absence of any such gloss I find it plain that 11 November is five days, and therefore "not later than five days" before 16 November. Had this point been material, therefore, which in the event it is not, I would have held in favour of RBSTB.

64. RBSTB's next submission turned on the words "without prejudice to their other rights under the Contract" in clause 39A.7.2 (paragraph 50 above). Mr Thomas contends, as I understand it, that that entitles RBSTB to exercise its right under clause 24.2.1 of the contract to "deduct the [liquidated damages claimed] from any sum due .... to [VHE] under this Contract" (see paragraph 20 above), including the money due under the adjudication decisions. I agree with Mr Furst that that involves reading "without prejudice to" as equivalent to "subject to". There may be contexts in which that meaning is required, but the more natural and usual one is "but leaving unaffected". Not only is that more natural and usual; it is in my view compelled in this instance by the context and by the purpose and intention of the statutory adjudication scheme, to which the contractual provisions must conform. The intention of these words in clause 39A.7.2, like "until the dispute .... is finally determined" in 39A.7.1 and "pending any final determination" in 39A.7.3 (paragraph 50 above) is to balance the need for swift and unconditional compliance with the adjudication decision on the one hand against the preservation of the parties' rights to contend for and, if justified, obtain a different final determination by litigation, arbitration or agreement. RBSTB's construction would destroy that balance and also drive a coach and horses through the requirements of section 111 by making it wholly unnecessary to comply with them. I reject it.

65. Finally RBSTB relies on a residual right to set off its liquidated damages claim. I use the word "residual" because many of the submissions already discussed were aimed (unsuccessfully, as I have held) at establishing, directly or indirectly, a means by which that claim could be deducted, withheld or set off by way of clause 30.3.4 of the contract or section 111 of the Act or by some other route. In my view there is no such residual right, where these adjudication decisions are concerned. In the first place the right under clause 24.2.1 is to deduct from monies due or to become due "under the contract". The money in question here was not payable under the contract, in the sense contemplated by that clause, but by way of compliance (albeit contractually required) with the adjudicators' decisions. More generally, for the reasons given in paragraphs 36 and 37 above section 111 now constitutes a comprehensive code governing the right to set off against payments contractually due. RBSTB has not complied with it. It would make a nonsense of the overall purpose of Part II of the Act, to which sections 108 and 111 are central and in which they are closely associated, not least by the terms of section 111(4), if payments required to comply with adjudication decisions were more vulnerable to attack in this way than those simply falling due under the ordinary contractual machinery. To return to the question left unanswered in paragraph 55 above, therefore, I find these compelling reasons for concluding that in clause 39A.7.2 and 39A.7.3, at least on the facts of this case, "comply" means "comply, without recourse to defences or cross-claims not raised in the adjudication".

66. Before leaving the issue of set-off I should record that VHE disputes RBSTB's claim to liquidated damages on the facts and merits, but that that circumstance was not advanced as a ground for rejecting it at this stage and does not enter into my reasons for doing so; if the point turned on that factual dispute alone RBSTB would plainly have a triable defence.

67. That concludes my assessment of the grounds advanced by RBSTB for resisting VHE's claim, all of which I accordingly reject.

The Part 24 test :

68. With the exception of paragraph 66 above I have hitherto expressed my analysis of the parties' rights and obligations and my assessment of the submissions advanced on each side in terms of a straightforward inquiry into the true construction and effect of the Act and the contract. I have done so not least because those were the terms in which the application was argued on both sides. I remind myself, however, that this is an application for summary judgment under Part 24 of the Civil Procedure Rules, and that under the heading "Grounds for summary judgment" Rule 24.2 reads, so far as relevant:

The court may give summary judgment against a .... defendant on the whole of a claim .... if -
(a) it considers that -
(i) ....
(ii) that defendant has no real prospect of successfully defending the claim .... ; and
(b) there is no other reason why the case .... should be disposed of at a trial.

69. There is no suggestion that head (b) has any application here. Head (a)(ii) therefore sets out the test which, so far as I can see, I must apply. The question is how that is to be approached.

70. Where there are disputes of fact the Part 24 test, like the Order 14 test before it, although perhaps with a slightly different emphasis, plainly requires a very different approach from that at a trial. In this case, however, there are no such disputes relevant to the issues which I have to decide, all of which turn on points of law, in particular the construction of documents. What difference, if any, does that make?

71. In my view help in answering that question can be derived from two sources. In the first place Part 24 of the Civil Procedure Rules replaces both Order 14 and Order 14A of the Rules of the Supreme Court. Order 14A provided a means for the summary disposal of "any question of law or construction of any document" which would be finally determinative of the proceedings or of any claim or issue in them. Under Order 14A the court was simply to "determine" any such question raised before it. I should, I think, approach the exercise of my powers under Part 24 on the basis that it was not intended to exclude the sort of jurisdiction previously exercised under Order 14A.

72. Secondly, in the exercise of the jurisdiction under Order 14, and even before the introduction of Order 14A, it was recognised that "Where the court is satisfied that there are no issues of fact between the parties, it would be pointless to give leave to defend on the basis that there is a triable issue of law, and this is so even if the issue of law is complex and highly arguable" (Supreme Court Practice, 1999, paragraph 14/4/2, citing **R.G.Carter Ltd v Clarke** [1990] 2 WLR 209).

73. I bear in mind that the terms of Rule 24.2 are different from those of either Order 14 or Order 14A and must be construed in the context of the changes of practice of which the Civil Procedure Rules are part, and in particular in the light of the overriding objective set out in Rule 1.1, but subject to that caution I believe that the considerations set out in paragraphs 71 and 72 above are of some relevance and assistance.

74. I also take into account that it would be a futile waste of time and costs, particularly in the light of the legislative purpose of section 108 of the Act, to order a trial at which, so far as I can see, precisely the same arguments would be repeated as have been deployed before me.

75. Taking all those considerations into account I have reviewed the issues discussed in paragraphs 26 to 67 above in terms of the test required by Rule 24.2 and conclude that RBSTB has no real prospect of successfully defending the claim, and that I should therefore give summary judgment against it.

Stephen Furst QC for the Claimant (Solicitors: Rowe & Maw)
Christopher Thomas QC and Jonathan Lee for the Defendant (Solicitors: Nabarro Nathanson)