JUDGMENT : HIS HONOUR JUDGE DAVID WILCOX : TCC : 16th February 2000

1. The claimant is a company specialising in network integration and structured cabling systems; the defendant is a company specialising in integrated building management.

2. In May 1997 the claimant and the defendant discussed co-operating together to tender for some of the work involved in the Bluewater Shopping Centre in Kent. There were discussions between the claimant, the defendant and the Bluewater Construction Management Team and representatives of the employer to be, bend Lease Projects Limited. The nature of the agreement eventually proposed was that the claimants would enter into a Trade Contract with Lend Lease to design and execute a site-wide communication system.

3. The defendant would be a subcontractor to the claimant and execute a substantial portion of the works, to include an integrated building management system. These proceedings were commenced on 1st February this year, 2000, by the claimant seeking declarations and an injunction. The preparatory work commenced on site, the defendants establishing site accommodation by Christmas of 1997. Actual works commenced after the Christmas break.

4. The claimant contends that the contract between the parties was made on or about 9th October 1997, or alternatively by 17th March 1998. It is right that Mr Darling, in his submissions, focused on the latter date as the primary case that he then was running. The relevance of these dates is clear. Disputes arose between the parties and on 14th January of this year. E Squared submitted a notice of intention to seek adjudication to workplace. In that notice they contended that the contract agreed between the parties did not comply with the requirements of sub-section 1 to 4 of Section 108 of the Housing Grants Construction and Regeneration Act 1996. Accordingly, the adjudication provisions of the scheme for construction contracts applied.

5. E Squared's solicitors submitted an application form to the Royal Institute of Chartered Surveyors for the appointment of an adjudicator, and on the 18th January of this year Mr JL Riches was appointed as adjudicator. He is the second named defendant to these proceedings; he has taken no part in the proceedings at all.

6. If the contract between the claimant and the defendant was concluded by the 17th March of 1998, then it is not a contract that falls within the provisions of the Act, because that Act only came into force on 1st May 1998. The reference, proceedings and decision would be void The defendant, E Squared, contend that the contract was concluded at the earliest at a meeting on or about 20th May 1998, and by 5th June 1998, when there was a Confederation of Construction Specialists form of secondary contract used subject to an agreement. I put that perhaps infelicitously There was an agreement to use such a form. That form is the Gold Form.

7. The claimant, Workplace, has made it; clear throughout that it disputes the jurisdiction of the adjudicator, and participation in the process of adjudication by serving a response to the referral notice to protect its interest was clearly under protest The adjudication process commenced on 14th January of this year It is under way following the swift and summary procedures laid down by Parliament.

8. The claimant seeks the following relief: first a declaration that the contract between the parties was entered into before Section 108 of the Act: came into force; second a declaration as to the terms of the contract as pleaded in paragraph 7 of the Statement of Claim, namely that there was a contract on 9th October 1997, varied on 17th March. Alternatively, they seek determination of the terms of the contract. Thirdly, a declaration that Mr Riches has no jurisdiction as an adjudicator in the dispute between the claimant and the first defendant; fourthly, an order restraining and preventing the first defendant, by its servants or agents, by continuing the reference to adjudication to Mr Riches, the adjudicator so named.

9. These applications first came before me on the Friday 3rd February. Some evidence was put before me on behalf of the claimants in the form of documents and witness statements. It is clear that the first defendants should be afforded the opportunity of meeting the claimants case and that oral evidence

was necessary to determine the issues arising out of the declarations. The hearing relating to these declarations was adjourned until Thursday 9th February.

10. Directions were given for limited disclosure as to the formation of the contract, and the exchange of witness statements. When it was apparent that the Court could give an early date for the final resolution of these claims, Mr Paul Darling, on behalf of the claimants, indicated that he would not pursue his application for an interlocutory injunction.

11. I turn to the issues that are raised in these applications. Firstly, when was the contract relating to the dispute between the parties concluded? Secondly, if before May 1st 1998, is the claimant entitled to an injunction as prayed? There are two subsidiary questions: First does the Court have power to grant an injunction where there is a void reference and the adjudicator has no jurisdiction? Second, if the Court does, should it exercise its powers in the circumstances of this case?

12. I turn briefly to the background of the case. The claimants and the defendants originally considered they might be viewed as joint contractors by Bluewater, who were the agents of Lend Lease, the final and ultimate employer in this case. Negotiations were with Bluewater Construction Management team at all relevant times.

13. The minutes of early meetings where preparatory discussions went on between the emp1oyer's representatives and the proposed main contractors and subcontractors show that E Squared took a full role in such discussions. They were party to the joint submissions, as consortium members, in the response process to the invitation to tender. Their obligations in that event, had they been accepted as contractors, would have been that of contractors face to face with the employers under the Trade Contract. The party's role in relation to the work proposed and done was separate, but complementary within the communications package.

14. On 23rd October 1997 Bluewater Construction Management Team informed Workplace that they were their preferred suppliers for the communication facility at Bluewater. They went on to say in the letter communicating this, paragraph 1, and I quote:

"(1) The appointment will be wade under the BCMT'S standard contract terms and conditions.

"(2) WTL will accept total project responsibility for the communication facility, installations and systems integration.

"(3) Formal 'Head of Agreement' will be established between WTL and E Squared and any other subcontractors to the consortium. Lend Lease will reserve the right to audit these agreements, however, they will remain the responsibility of WTL."

15. The contractual framework with Lend Lease, the employer, Workplace, the contractor, and E Squared the subcontractor, was anticipated in a letter of 9th October 1998, written by Mr Graham Nicholls of E Squared to Mr Robinson of Workplace. It is in these terms:

"Andy, further to our recent telephone conversation we confirm the following commercial items:

"(1) We will accept the terms of the Bluewater contract on a back-to-back basis with yourselves in so far as they apply to our scope of works and with any improvements you are able to negotiate;

"(2) This will form the basis of the contract between us, with appropriate modifications to reflect items raised in the Heads of Agreement previously copied to you;

"(3) We confirm the value of our element is set out in your final assessment response and the associated spreadsheet copied by e-mail to ourselves on 3rd October 1997.

"We trust all is to your satisfaction".

16. The claimants remained in negotiation with Bluewater Construction Management until the l5th May Matters such as the form of bond, warranties to principal tenants and funders1 the review of certificates by a court, professional indemnity insurance whether a scheme of milestones would be available, the costing of variations and extensions of times, as at 9th October all matters to be agreed. As is evidenced in paragraph 8 of the minutes of the meeting of 3rd November 1997, involving Workplace, Bluewater Construction Management, E Squared and others, E Squared were party to the discussions of particular aspects of the evolving Trade Contract alongside Workplace.

17. I accept Miss Sugden's evidence - - she is workp1ace's solicitor - - that at this meeting Mr Hughes of Bluewater Management Consultants said that no amendments would be permitted to the Form of Trade Contracts, as all other trade contractors were signed up to these terms and conditions.

18. On 5th November 1997 Workp1ace's in-house so1icitor, that is Miss Sugden, wrote making proposals, and seeking clarification in relation to the six matters raised in the letter of 9th October to Bluewater. In turn these were commented on in Bluewater's letter of 19th December 1991, and negotiations and the refinement at aspects of the agreement went on during the spring of 1998. On 3rd April 1998 a Schedule of Agreement was forthcoming, evidencing nonetheless that the number and extent of certain matters had been agreed but certain matters were outstanding, as was the question of certification and professional indemnity.

19. There were still outstanding matters in relation to the Trade Agreement, that is at the beginning of May, which were evident in the document that I have made reference to. In her letter of 1st May 199S Miss Sugden of Workplace sought reassurance that the bond would not be treated as a demand bond, and as to the status of programme and payment dates. There was also the question of the IBMS protocols and data documents I regard the latter matters as being somewhat peripheral to the main agreement.

20. By 15th May 1998 it was apparent that the Bluewater Construction Management Team and WT had reached substantia1 agreement on most: of the relevant matters to be included in the formal agreement. There is a minute of a meeting of that date. I quote from that minute: *"Adrian Hughes [*that is of Bluewater*] has agreed wording with Miss Dawn Sugden, Russell Edwards and Andy Robinson [the latter two of Workplace]. He is now in a position to create the contract pack, which will be signed by Workplace first. He informed all that due to Millennium compliance that countersigning would be delayed until compliance had been agreed, but the compliance statement had yet to be drafted. This had affected all contracts. He proposed that once Workplace had signed the contract he would issue a letter of I intent to which Mr Robinson of Workplace was compliant."*

21. Lend Lease Limited were of course the novel employers. The question of Bluewater requiring a bond from Workplace resulting in a bond from E Squared remained to be agreed until 15th June 1998, when the position in relation to insurance was also clarified.

22. A letter of intent was mentioned by Mr Hughes, requested by Workplace, was given on 20th July 1998. It covered works of less than half the value of the proposed contract sum, namely £950,000 of £2,222,224. A formal contract followed much later. I have not seen that contract, and the terms of that contract have not been canvassed before me in any detail.

23. It is against this background that; it is appropriate to consider the contractual position of the claimant, and of the defendants. I turn now to the contract. In addition to the documentary evidence, I heard the oral evidence of Miss Dawn Sugden, the c1aimant's employed solicitor. on the whole I found her to be a reliable and accurate witness. I had some reservations, however, upon the accuracy of her recollection as to her state of mind and intent over the question of the use of the Gold Form. I will deal with that matter in a moment. Mr Andy Robinson, Workplaces accounts manager, gave evidence in which he commented upon the documents already before the Court. He did not advance matters further. It is clear that Miss Sugden was the witness in the position to give relevant evidence as to the formation of the contract from Workplace's standpoint.

24. Graham Nicholls, the Managing Director of E Squared at the relevant time, gave evidence on behalf of the defendants. He is no longer employed by them.

25. He struck me as a thoughtful, albeit sceptical witness, who chose his words with very great care. He accepted that by 9th October 1997 the price at E Squared's component had been substantially agreed and that save for an increase in the price to reflect some additional scope of works, included in Bluewater's requirements of March 1988, the pricing formulation remained broadly the same. The October 1997 price was £628,000. That at March 1998 was £923,000, to include the cost: and pricing relating to 2,000 extra contact points. The scope of works was agreed broadly by 9th October 1997. By

late December, after the Christmas break, same work had in fact commenced, as I made reference to earlier.

26. Mr Nicholls, it is dear, left details of his company's contractual arrangements to Mr Owen O'Connell, the company's Quantity Surveying Director. When pressed as to the use of the Gold Form he said it was more in Owen O'Connell's field. It is clear that his understanding as to the payment terms under clause 4 of the Gold Form displayed a lack of unanimity when one comes to consider the evidence of Mr O'Connell. We have a date inserted that is struck out and in fact ultimately, in any event, by subsequent agreement evidenced in E Squared's letter of 5th August 1998, it was confirmed to be 35 days from application in the amounts certified by the Bluewater Contract Management Team.

27. Mr O'Connell was called to give evidence by Mr Wilmot-Smith. He produced a Copy of the Gold Form retained by E Squared; a copy of the document that had been sent to workplace in 1997. His copy was incomplete; it contained many blanks. This is not surprising, since I am satisfied that Miss Sugden agreed to review it and fill in the blanks some time in May 1998. Her manuscript aide memoire of 20th May 1998, and later confirmatory letter of 5th June, evidenced this.

28. Miss Sugden, in her original witness statement, accepts that she received the Gold Form on 6th January 1998, and said: "I did not complete the Gold Form at this time, or at any other time."

29. The implication of that being that she never agreed to use it at all. In her oral evidence she said she did not agree to use the unamended form. She was then being asked about Clause 6 of the Gold Form. She had earlier in May, I am satisfied, agreed to use the Gold Form. She confirmed this in her letter of 5th June 1998 I quote from that letter: "As you have suggested, we will use the Gold Form, which I will complete in due course. However, for the avoidance of doubt, please note that Workplace Technologies' obligations, under their Trade Contract, will be fully backed off to E Squared."

30. The file copies retained by Miss Sugden contain manuscript instructions I do not know whose handwriting these are in. One such is in the following form: *"Nadia: Please fill in the back and return to OO";* OO is clearly Mr Owen O'Connell.

31. Miss Sugden accepted that at the meeting of 20th May 1998, far which she prepared her aide memoire, nothing was said about any of the terms and conditions being unacceptable. This includes Clause 6, which provides, and I quote; *"No other set-off or deduction shall be made from any interim payment unless agreed by the secondary subcontractor, or unless relating to a claim by the primary subcontractor for actual loss already incurred by the primary subcontractor as a direct result of the breach of this secondary subcontract by the secondary subcontractor. A set-off relating to such a claim may be made from any payment unless with a statement of the amount of the claim to be set off quantified in detail, and with reasonable accuracy, has been received by the secondary subcontractor by the date when the payment was due".*

32. It is evident, as Mr Nicholls described it, that there was a continuum of negotiation. In the contractual negotiations between the claimant and the representatives of Lend Lease, there are a series of stages of agreements which reflected the course of the negotiations. I am satisfied that had Workplace not been chosen as the lead in the Communications Consortium, it is clear that E Squared were prepared to accept many of the Trade Contract obligations directly.

33. The nature of the risks and obligations they envisaged from the outset did not essentially change throughout. I have already made reference to the terms of E Squared's letter of 9th October to Workplace. It accepts the Trade Contract terms on a back-to-back basis, in so far as they apply to the E Squared scope of works. I quote: *"This will form the basis of a contract with the appropriate modifications".*

34. I do not hold that there was by then a concluded contract. By 16th December 1997 the defendants had established the site office; work had commenced a fortnight after Christmas. Whilst the price had been agreed, & the scope of the programme was evident, it is against that that one looks at E Squared's letter of 16th December 1997. They forwarded a copy of the Gold Form, which they proposed to use for the Bluewater project. I quote: *"Could you please review the document. If you are happy to proceed with it, could you fill in the relevant sections and return."*

35. It was not returned. Miss Sugden says, and I accept, that she had reservations about Clause 6. She never said so.

36. The next matter of significance in the Chronology is the Purchase Order of the 26th January 1998 from Workplace to E Squared in the sum of £85,000. On the face of it there was no existent contract to which the design and integration services there mentioned were referable. Miss Sugden says that she had no knowledge of the order and speculated that it derives from some payment mechanism of the Accounts Department to authorise payments even under existing Contractual obligations. No other such order has been disclosed. It is inconsistent with there being an already concluded contract between the parties. In my judgment the parties had not by January 1998 concluded a contract.

37. There was still outstanding matters of importance, such as Clause 6, the percentage charges for additional works, variations and the overheads to be charged for them.

38. By 23rd February 1998 both parties addressed Bluewater's further requirements for a wider scope of work to include 2,000 extra contact points. These were not included in the original vision documents. This fell within E Squared's expertise, and I have already made reference to the additional price that was charged by them in relation to that. I turn to the letter of 23rd February 1998 from Mr Nicholls of E Squared written to Mr Robinson of Workplace:

39. "Further to discussions we confirm the following:

"(1) I have e-mailed a file [as far as that is relevant that passage goes on] which contains my Lend Lease specification document, and for clarity a current schedule including only the E Squared elements, giving a base contract sale price of 3 £648,228.

"(2) We will accept the terms of the Bluewater contract on a back-to-back basis with yourselves in so far as they apply to cur scope of works, with any improvements you are able to negotiate passed on to us via the Gold Farm contract copied by Brian Smith to Russell Edwards.

"(3) Neither E Squared nor WTL have agreed that overheads percentages will not be applied to additional items and options. This must be clarified before contract signing.

"I have attempted to make contact with Adrian Hughes today to discuss this and will keep you posted."

The reference in paragraph 3 to "contract signing" is of course to the Trade Contract.

40. E Squared's letter of 17th March 1998 reflects the additional work and price and goes on to reiterate the terms of the earlier letter of 23rd February. I make reference, however, to the second paragraph of that letter: *"We again confirm we will accept the terms of the Bluewater contract on a back-to-back basis in so tar as they apply to our scope of works, with any improvements you are able to negotiate passed through us via the Gold Form contract ..."*

41. The second paragraph in this context means that Gold Form, in my judgment, is intended to apply to the acceptance of the Bluewater contract on the back-to-back basis and to any negotiated future improvements. Whilst Miss Sugden may have been preoccupied with the fine-tuning of the Trade Contract, nevertheless she did not apply it to this letter, perhaps because there was nothing that she was then minded to take exception to. Where it has been necessary or desirable to take exception she has done so prompt1y and with particularity. It is evident in her correspondence with Bluewater as to the terms and negotiation of the Trade Agreement.

42. There was a meeting on 20th May 1998 between E Squared and Workplace at E Squared's office at 11.00 am. According to the minutes it related to the Contract Agreement and E Squared's Partnership Agreement. I have already referred to Miss Sugden's memorandum and her correspondence of 5th June 1998.

43. Whilst the form of an agreement can be divorced from its content, as when parties conclude an agreement, then seek to evidence that agreement formally by incorporating it into a formal document, I do not find this to be the case here. The Gold Form was not, as Miss Sugden suggested, merely a convenient vehicle for the recording of an already concluded agreement. I see that it was not really until 20th May 1998 that there was any documentary reference to the Gold Form in the disclosure of Workplace, despite the reiterated request of E Squared in relation to the Gold Form. It was not expressly dealt with until Miss Sugden's letter of 5th June 1998 to E Squared's Mr O'Connell - when I say expressly, I mean in writing. Mr O'Connell gave evidence and he expected the Gold Form to be

completed by Workplace, who were the party in a position of an employer, by filling in the details in the blanks. They were in a position to have such information readily to hand as the contractor under the Trade Contract.

44. It is significant that there is no suggestion that any other amendment to the form, other than the filling in of the blanks, seems to have been contemplated Miss Sugden, in her letter of 5th June 1998, accepted that obligation without qualification or rider. I am satisfied that it was not until at the earliest 20th May, but certainly by 5th June, that the contract between the parties was ultimately concluded.

45. Miss Sugden displayed an understandable caution prior to this time, because she had not sufficient up-line assurance as to Workplace's position with Lend Lease Limited. Clearly that is why she sought a letter of intent from Bluewater, Lend Lease, on that date, as not coming in the sum that she required.

46. I hold that the defendant is not entitled to the declarations sought. This is perhaps a case that demonstrates the difficulty of a party, in this case the claimant, seeking to ride two horses at: once.

47. I turn to the question of costs. I have to consider the costs of the hearing on Friday 3rd February relating to the application for an interim injunction. Mr Wilmot-Smith says that the costs should be his in any event. Mr Darling submits that the application was properly made and with merit and that this should not necessarily follow.

48. The injunction was not pursued, because of the early hearing date given by this Court to determine the declaration issues finally.

49. I am not persuaded there is power to grant an injunction to restrain a party initiating a void reference and pursuing proceedings which themselves are void and which may give rise to a void and thus unenforceable adjudication decision. There does not appear to be any legal or equitable interest such as an injunction would protect. Mr Darling was unable to identify one. Doubtless the initiation of such proceedings may be conceived to be a source of harassment, pressure, or needless expense.

50. In the analogous field of arbitration no action lies to prevent this, see **North London Railway Company v Great Northern Railway Company** [1888] 11 QBD 30, approved in **Siskina V Distos** [1979] AC 210, in the speech of Lord Diplock at page 256, at letter E, where he said and I quote: "That the High Court has no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment, was firstly laid down in the classic judgment of Cotton LJ in North London Railway Company, which has been consistently followed ever since."

51. Despite some dicta to the contrary, in **Bremer Vulkan** [1981] AC 909. a case where the courts would not restrain a valid arbitration, I place reliance upon the analysis and commentary in *Mustill & Boyd*, 2nd Edition, in the passages at page 518 to page 525, and particular1y the passage at page 522 where it is said, and I quote: *"Mere harassment by unfair or futi1e proceedings does not found a remedy. The party must be harassed by the infringement of a legal or equitable right. These proceedings do not assert or, identity any such infringement. However, for the purposes of this costs application I will assume that the Court does have power to grant an injunction."*

52. I am satisfied in this case, on the evidence available to me on 3rd February, that the issues to be tried get beyond the threshold need to show that there was a serious question to be tried, see **Re Cable (deceased)** [1977] 1 WLR 7, and the analysis of Mr Justice Slade of the authorities at page 19.

53. In most adjudication cases it perhaps would be difficult to satisfy this threshold test. The balance of convenience, in my judgment, favours allowing an adjudication process to continue.

54. If the Court grants an injunction without determining the issue of the date of the contract then it inexorably follows that it may be interfering in a valid adjudication to its detriment. The statutory scheme of the giving of an early decision as to who shall hold the money pending litigation or arbitration will then have been frustrated. The undesirable consequence would be that the process of adjudication could be halted by raising a case to the effect that adjudication was void. It the defendant was right about the date of the contract, at the most he might be subjected to a futile application, should he choose to participate, but in any event the adjudication decision is unenforceable because it is void.

55. The application for inter1ocutory relief, in my judgment, had no reasonable prospect; of succeeding. I order that the costs of 3rd February, including the application tar an interlocutory injunction, and the directions, to be paid by the claimant, such costs to be subject to detailed assessment it not agreed. The costs of the hearing of 10th February will be paid by the claimant, such Costs to be subject to detailed assessment if not agreed. Are there any other matters?

DISCUSSION RE COSTS

MR DARLING; *I think it follows that your Lordship dismisses the actions and makes the orders for costs that your Lordship indicates?*

JUDGE WILCOX: *I do.*

MR DARLING *As a matter of form, your Lordship I think is now enjoined by the Court of Appeal to consider whether application is made tar the question of leave to appeal. I know immediately in relation to tile substance at the matter what your Lordship's reaction to that matter will be, but if your Lordship is minded to refuse leave that ought to be recorded. So far as the injunction question is concerned, my Lord, I do not ask your Lordship for leave. It is a point that I am sure will trouble the Court of Appeal at some stage, but it is peripheral to this action.*

JUDGE WILCOX*: It is peripheral to this action. You are quite right, Mr Darling. I dealt with the matter out of deference to the arguments which both you and Mr Wilmot-Smith very helpfully addressed to inc.*

MR DARLING: *Yes.*

MR REGAN: *Can I just mention one point? Mr Riches did submit, my Lord, a statement Qt his costs when he turned up at the hearing for the injunction. I do not know how you wish to deal with that, but it does seem appropriate that perhaps those should be dealt with as well.*

MR DARLING: *My Lord, plainly Mr Riches was present on that occasion.*

JUDGE WILCOX: *He took no part in the proceedings, did he?*

MR DARLING: *No, but he was here on 3rd February. The usual question is whether a 1itigant in person is entitled to his costs and if soon what basis.*

JUDGE WILCOX: *He is, is he not, if he is a professional man?*

MR DARLING: *As your Lordships knows there is the regime that deals with that. I have no difficulty with an order against my clients that they pay the adjudicator's costs of that day or any costs he has incurred in the action subject to a detailed assessment. I do not think I can properly oppose that because he was a party to the action.*

JUDGE WILCOX *He is clearly a party to the action. Thank you very much, Mr Darling. Mr Darling has pointed out that Mr Riches, although he took no active part in the proceedings, as I made reference to in the course of my earlier observations, was present here and there was a document submitted to the Court. It is right that he should have his costs, those costs, if not agreed, to be subject: to detailed assessment, those costs to be paid by the claimant. Thank you. I direct that there be a transcript made of this recording and made available to the parties.*

MR P DARLING QC (instructed by Speechly Bircham) appeared on behalf of the Claimant

MR R WILMOT-SMITH QC and MR M REGAN (instructed by Rowe & Maw) appeared on behalf of the First Defendant.

The Second Defendant (Mr Riches) was not represented at this hearing.