Before : Brooke LJ, (Vice President of the Court of Appeal, Civil Division), Clarke LJ, Neuberger LJ : CA on appeal from the Central London Country Court (HHJ Knight QC) : 7th December 2004.

LORD JUSTICE CLARKE:

Introduction

1. This is an appeal from an order dated 22nd April 2004 as varied by an order dated 16th June 2004 in which His Honour Judge Knight QC stayed the appellant's claim under section 9(4) of the Arbitration Act 1996 ("the Arbitration Act") and ordered the appellant to pay the respondent's costs. The appeal is brought with the permission of the judge.

The claim

2. By an agreement in writing, dated 10th September 2002, on the JCT Agreement for Minor Works Form, as amended to include some amendments at least up to MW 1998, the appellant, which is a builder, and which I will call the contractor, agreed to carry out repairs and other works to premises at Baltic Quay, Sweden Gate, in London SE16. The respondent is the employer under the contract.

3. The contract price was £139,045. The contractual commencement and termination dates were 9th September 2002 and 27th January 2003 respectively. Clause 4 of the contract makes detailed provisions for payment. Clause 4.2 provides for the contract administrator, which was Sturges Associates (SMS), at intervals of not less than 4 weeks to certify progress payments as due to the contractor in respect of *"the value of the Works properly executed*" less a retention of 5 per cent, and further provides that the employers shall pay the amount so certified within 14 days of the date of the issue of the certificate.

4. SMS issued a number of certificates on the following dates for the following amounts, net of retention, and exclusive of VAT: No 1, 14th October 2002, £14,673.70; No 2, 25th November 2002, £15,273.15; No 3, 29th January 2003, £40,760.70; No 4, 28th February 2003, £64,040.45; and No 5, 25th June 2003, £28,331.34.

5. The employer paid the sums certified in the first four certificates, which amounted to £134.748, but they have not paid the amount certified in Certificate No 5. In fact by the time Certificate No 5 was issued SMS had issued a certificate of practical completion dated 31st March 2003. The date certified as the date of practical completion was 28th March 2003, and the expiry date of defects liability period was stated as 27th September 2003. That period of 6 months was the period specified in clause 2.5 of the contract.

6. Clause 4.3 of the agreement provides so far as relevant:
"The Contract Administrator shall within 14 days after the date of practical completion certified under clause 2.4 hereof certify payment as an amount due to the Contractor of 97½%... of the total amount to be paid to the Contractor under this Contract so far as that amount is ascertainable at the date of practical completion including any amounts either ascertained or agreed under clauses 3.6 and 3.7 hereof less the total amounts due to the Contractor in certificates of progress payments previously issued. The penultimate certificate shall state to what the progress payment relates and the basis on which the amount of the certificate was calculated. The final date for payment by the Employer of the amount so certified shall be 14 days from the date of issue of that certificate. If the Employer fails properly to pay the amount, or any part thereof, due to the Contractor by the final date for its payment the provisions of clause 4.2.2 shall apply. The provisions of clause 4.4 shall apply to the certificate issued pursuant to this clause 4.3."

7. SMS did not issue a document entitled "Penultimate Certificate" within 14 days but did issue Certificate No 5 on 25th June 2003. It may be that, even though it does not say so, that was intended to be a penultimate certificate under clause 4.3, because the retention was expressed to be 2.5 per cent as contemplated by that clause. Indeed, the contractor's case is now that Certificate No 5 is indeed the penultimate certificate contemplated by clause 4.3.

8. I should note clauses 4.4.1 and 4.4.2, which provide for the employer to give certain notices. Neither notice was given in this case, with the result that clause 4.4.3 applies. It provides:
"*Where the Employer does not give a written notice pursuant to 4.4.1 and/or to clause 4.4.2 the Employer shall pay the amount stated as due in the certificate."*

9. I should also note clause 4.5 which is headed "Final Certificate" and provides:
"The Contractor shall supply within three months... from the date of practical completion all documentation reasonably required for the computation of the amount to be finally certified by... the Contract Administrator and...

the Contract Administrator shall within 28 days of receipt of such documentation, provided that... the Contract Administrator has issued the certificate under clause 2.5 hereof, issue a final certificate certifying the amount remaining due to the Contractor or due to the Employer as the case may be and such sum shall, as from the fourteenth day after the date of issue of the final certificate be a debt payable as the case may be by the Employer to the Contractor or by the Contractor to the Employer."

10. On 10th July 2003 the contractor wrote to the employer in these terms:
"Our invoice SPA B897 was due to be paid by 9th July.

"We note you have failed to comply with the conditions of [contract] regarding payment and hereby put you on 7 day notice that we will determine the contract if you continue to default with payment."

11. On 18th July the contractor wrote as follows:

"*Further to our letter of 10th July, putting you on notice of our intention to determine the contract, we note you have failed to respond or make the payment due under the contract. We therefore continued the default.*

"We therefore have no option but to determine the Minor Works Contract between ourselves.

"We have determined the Contract under class 7.3.1.1 'does not pay by the final date for payment'.

"Thus the contract is at an end and all sums are due including any retention.

"We will therefore prepare our final account as required under clause 7.3.3 - Please note this will be due for settlement within 28 days of submission (clause 7.3.3).

"Please also be aware that the Contract Administrator now has no involvement in final account figures and it is the Contractor who prepares the final account."

12. The contractor thus purported to determine the contract under clause 7.3.1, which provides, under the heading "***Determination by Contractor***":
"If the Employer makes default in any one or more of the following respects:

"1 he does not pay by the final date for payment the amount properly due to the Contractor in respect of any certificate or pay any VAT due on that amount pursuant to clause 5.2 and the Supplementary Memorandum Part B...

"the Contractor may give notice to the Employer which specifies the default and requires it to be ended. If the default is not ended within 7 days of receipt of the notice the Contractor may by further notice to the Employer determine the employment of the Contractor under this Contract. Such determination shall take effect on the date of receipt of the further notice. A notice of determination under clause 7.3.1 shall not be given unreasonably or vexatiously."

The contractor thus gave a notice under clause 7.3.1.1 and then purported to determine the contract under the last part of clause 7.3.

13. In the letter just quoted the contractor said that it would prepare its final account as required by clause 7.3.3 which would be due for settlement within 28 days. Clause 7.3.3 provides:
"Upon determination of the employment of the Contractor under clause 7.3.1 or clause 7.3.2 the Contractor shall prepare an account setting out - the total value of work properly executed and of materials and goods properly brought on the site for the purpose of the Works, such value to be ascertained in accordance with this Contract as if the employment of the Contractor had not been determined together with any amounts due to the Contractor under the Conditions not included in such total value; and

- the cost to the Contractor of removing or having removed from the site all temporary buildings, plant, tools and equipment; and

- any direct loss and/or damage caused to the Contractor by the determination.

After taking into account amounts previously paid or otherwise discharged to the Contractor under this Contract, the Employer shall pay to the Contractor the full amount properly due in respect of this account within 28 days of its submission by the Contractor."

As can be seen, the amount which the employer is bound to pay under clause 7.3.3. is "the full amount properly due in respect of this account within 28 days."

14. On the same day that the determination letter was sent, 18th July 2003, the contractor wrote a further letter enclosing a final account. The letter drew attention to the fact that the contract had now been determined and added that as required under the contract the contractor had prepared the final account and that the employer was duly bound to pay it within 28 days. The last paragraph asserted that legal

action would be commenced immediately after 28 days and without further notice if the above amount, namely £180,516, was not received. The total amount of the claim, inclusive of VAT, but less the amount of £134,748, was £53,777.40. That sum therefore included the £28,331.34 which was the subject of Certificate No 5. I should have added that the figure of £180,516 was a gross figure.

15. The contractor's solicitors sent a letter before action dated 22nd July 2003. The employer did not pay. There followed correspondence between the solicitors to the parties. The contractor complains that no positive case was advanced by or on behalf of the employer which might have afforded a defence to the claim until January 2004. There is some force in that complaint, but it is right to say that the employer's solicitors made various points in the correspondence, albeit of a largely negative nature.

16. It was as a result of representations by the employer that the parties followed the appropriate preaction protocol. The contractor specifically, and in particular, relied throughout on Certificate No 5 as issued by the employer's contract administrator, SMS.

17. It is right to say that in a letter of 3rd September the employer's solicitors drew attention to the fact that under the contract any dispute between the parties must be resolved by adjudication or arbitration. The contractor's solicitors do not respond specifically to that letter, but in a letter of 11th September they said that they did not accept that the protocol applied because there was no dispute as to the extent or quality of the works undertaken by the contractor which had been intimated. In that letter they set out the contractor's case.

18. The correspondence continued throughout the autumn of 2003. At no stage during the correspondence did the employer admit liability, either in respect of Certificate No 5, or in respect of the final account.

19. On 22nd December 2003 the contractor issued a claim form in the Technology and Construction Court, claiming £87,066.73 plus interest and costs. It served particulars of claim claiming that amount, which was the aggregate of Certificate No 5 inclusive of VAT, namely £33,289.33, and the final account of £53,777.40. Subsequently, on 3rd February 2004, the particulars of claim were amended to reflect the fact that the final account includes the amount certified in Certificate No 5, and reduced the claim to 53,777.40.

20. The claim included the assertion that section 111 of the Housing Grants, Construction and Regeneration Act 1996 ("the Housing Grants Act") applies to the claim and, as is the case, that no notice withholding payment had been served on the contractor under section 111(2). Section 111(1) provides so far as relevant:

"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."

I shall return to that section below.

Adjudication and arbitration

21. In the form of contract which was signed, Article 4 provides so far as relevant as follows:

"If any dispute or difference as to the construction of this Agreement or any matter or thing of whatsoever nature arising thereunder or in connection therewith ... shall arise between the Employer or the Architect/the Contract Administrator on his behalf and the Contractor either during the progress or after the completion or abandonment of the Works or after the determination of the employment of the Contractor it shall be and is hereby referred to arbitration in accordance with clause 9. If under clause 9.1 the Employer and the Contractor have not agreed a person as the Arbitrator the appointer of the Arbitrator shall be the President or a Vice-President for the time being ... of the Royal Institution of Chartered Surveyors."

22. That clause was treated as the relevant arbitration clause before the judge. It is now common ground, however, that, partly because of a later amendment to the form agreed by the parties, and partly because of the reference to the Royal Institute of Chartered Surveyors in the signed version of Article 4 which I have just quoted, the relevant Article 4 is, or should be taken to be, so far as relevant, in these terms:

"Article 4

"4.1. If any dispute or difference arises under this Agreement either party may refer it to adjudication in accordance with the procedures set out in Part D of the Supplementary Memorandum to the Agreement for Minor Building Works. If, under clause D2 the Parties have not agreed a person as the Adjudicator the nominator of the Adjudicator shall be: ... ·Royal Institution of Chartered Surveyors. ...

"4.2 Subject to Article 4.1 if any dispute or difference as to any matter or thing of whatsoever nature arising under this Agreement or in connection therewith, except in connection with the enforcement of any decision of an Adjudicator appointed to determine a dispute or difference arising thereunder, shall arise between the Parties either during the progress or after the completion or abandonment of the Works or after the determination of the employment of the Contractor ... it shall be referred to arbitration in accordance with the procedures set out in Part E of the Supplementary Memorandum.

"If, under clause E2.1, the Parties have not agreed a person as the Arbitrator the appointer of the Arbitrator shall be: The President or Vice-President: ... ·Royal Institution of Chartered Surveyors."

23. The reason for that amendment to the standard terms was the provisions of Part II of the Housing Grants Act relating to construction contracts, of which it is common ground that the contract is an example. Section 108 of that Act provides, so far as relevant:
"(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.
For this purpose "dispute" includes any difference.
(2) The contract shall - ...
(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.
The parties may agree to accept the decision of the adjudicator as finally determining the dispute. ...
(5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply."

24. It is, as I understand it, common ground that the contract satisfied the requirements of section 108, with the result that the provisions of the Scheme referred to in section 108(5) do not apply, subject only to this. Section 108(6) provides:
"For England and Wales, the Scheme may apply the provisions of the Arbitration Act 1996 with such adaptations and modifications as appear to the Minister making the scheme to be appropriate ..."

25. Paragraph 24 of the Scheme provides, in effect, that section 42 of the Arbitration Act applies as appropriately amended, which has the effect that the court has jurisdiction to enforce an order made by an adjudicator; see **Macob Civil Engineering Ltd v Morrison Construction Ltd** [1999] 1 BLR 93. It is no doubt in the light of those provisions that clause 4.2 excludes the enforcement of any decision of an adjudicator from the arbitration provisions of the contract.

26. In all these circumstances it is common ground that both parties had the right to refer a "dispute arising under the contract" to adjudication; a dispute expressly including a difference. If either party had referred a dispute to adjudication, section 42 of the Arbitration Act, as adapted, and section 108(3) of the Housing Grants Act would have applied.

27. Section 9 of the Arbitration Act provides, so far as relevant:
"(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter. ...

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

28. The employer sought a stay of this action under section 9(1) on the basis that there was and is "a dispute or difference" between the parties arising in connection with the contract and that it is entitled to a stay under section 9(4).

The decision of the judge

29. The judge granted the stay. He did so on the basis that there was a dispute or difference between the parties within the meaning of Article 4. He followed the decision and reasoning of this court in **Halki Shipping Corporation v Sopex Oils Ltd** [1998] 1 WLR 726 ("**The Halki**").

The appeal

30. Mr Robson submits on behalf of the contractor that the judge's decision was wrong. He submits that the decision and reasoning in **The Halki** do not lead to the conclusion reached by the judge. He submits that the effect of section 111 of the Housing Grants Act is that where, as here, a notice of intention to

withhold payment has not been given by an employer, the employer is not entitled to withhold payment and the contractor is accordingly entitled to judgment in the amount wrongfully withheld.

31. Mr Robson submits that in this connection the claim is not unlike that on a bill of exchange such as a cheque. He submits that section 111 should be so construed because otherwise an employer who has no defence will in practice be able to avoid payment and cause the kind of delay which section 111 was designed to avoid. He further submits that **The Halki** was not concerned with a claim under section 111 and relies upon the decision of this court in **Rupert Morgan Building Services (LLC) v Jervis & Anr** [2004] 1 WLR 1867, [2003] EWCA Civ 1563.

32. In considering those submissions I should, I think, consider first the decision and reasoning in **The Halki** which is central to Miss Houghton's submissions to the contrary, and indeed to the decision of the judge.

33. Miss Houghton's submissions on behalf of the employer, based on **The Halki,** can be summarised in this way: (1) the arbitration clause, Article 4.2, is in very wide terms. Under it the parties agree to refer to arbitration "... any dispute or difference as to any matter or thing of whatsoever nature arising under this Agreement or in connection therewith..." (2) It follows that any dispute or difference as to any matter or thing in connection with the contract "is to be referred to arbitration" within the meaning of section 9(1) of the Arbitration Act. (3) If there is here such a dispute or difference, the court must grant a stay under section 9(4) because no-one suggests that the arbitration agreement is "null and void, inoperative, or incapable of being performed". (4) There is here a dispute or difference in connection with the contract because the claimant claims the sum of £53,777.40 under the contract which the employer has not admitted and has refused to pay. There is thus a dispute or difference as to whether the employer is liable to pay £53,777.40 under the contract. (5) **The Halki** is authority for the proposition that a "dispute", whether in section 9(1) of the Arbitration Act or in an arbitration clause in a commercial contract, is not restricted to such dispute (whether as to liability or quantum) as would have been found by the court to merit leave to defend under RSC Order 14, or as would today be held to be sufficient to deny the claimant summary judgment under CPR 24.2.

34. For my part I would accept those submissions unless there is something in the Housing Grants Act, or in some special feature of contracts of this kind in general, or of this contract in particular, which leads to some other conclusion.

35. In **The Halki** the majority of this court, which comprised Henry LJ and Swinton Thomas LJ, with Hirst LJ dissenting, held that the Arbitration Act had altered the law in this regard. The law had previously been that a stay would not be granted under section 1(1) of the Arbitration Act 1975 if the plaintiff would have been entitled to leave to defend under RSC Order 14. In **The Halki** the court held that there is a crucial distinction between section 1(1) of the 1975 Act and section 9(4) of the 1996 Act. Under section 1(1) of the 1975 Act the court was required to grant a stay *"... unless satisfied that the arbitration... is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred... "* (my emphasis).

36. As can be seen from section 9(4) of the Arbitration Act quoted above, the words italicised no longer appear. In **The Halki** this court held: (1) that it had been those words which were the foundation of the principle that a stay would be refused if a defendant had no arguable defence to a claim for summary judgment under RSC Order 14; and (2) that the consequence of their removal was that a stay would be granted whenever there was a "dispute", regardless of whether the defendant had an arguable defence to the plaintiff's claim.

37. It thus follows from **The Halki** that it is no answer to an application for a stay under section 9 of the Arbitration Act that the defendant has no arguable defence to the claimant's claim. If there would otherwise be a "dispute" within section 9(1) it is no answer to an application for a stay to say that it is not a real dispute because the defendant has no defence to the claim. That was the very point decided in **The Halki.**

38. Yet to my mind that is the very argument being advanced by Mr Robson on behalf of the contractor. He says that the employer has no defence, or no arguable defence, to the claim, or at any rate to the claim under Certificate No 5, by reason of section 111 of the Housing Grants Act. Let it be supposed that the

employer has no such defence, or arguable defence, there is, in my opinion, nothing in section 111 to deprive the employer of its right to a stay. Section 111 is concerned only with the substantive rights of the parties. It is not concerned with the question whether the claim for the monies wrongfully withheld should be determined by the court or by an arbitrator. It is, in my judgment, plain from The Halki, first, that that depends upon whether there was a "dispute" within the meaning of the arbitration clause and is thus a matter which is agreed to be referred to arbitration within section 9(1) of the Arbitration Act, and, second, that whether there is a dispute does not depend upon the strength or weakness of the defendant's case on the merits of the "dispute".

39. I would accept Miss Houghton's submission that section 111 is silent on the question whether a claim for monies withheld is subject to arbitration or not. Mr Robson submits that such a conclusion would deal a fatal blow to section 111 and I think he would say to adjudication too. However, I would not, for my part, accept that submission, for at least four reasons.

40. The first is that if Mr Robson is right I see no alternative to the conclusion that the contractor could not submit the dispute either to adjudication or to arbitration. In either case a party can only refer a claim if there is a dispute. The logic of Mr Robson's case is that if the claim is not disputable there is no dispute, but that would mean that a contractor could not invite an adjudicator or an arbitrator to make an award in its favour. As Brooke LJ observed in the course of the argument, the logic of this was recognised and an almost identical argument rejected by Swinton Thomas LJ in **The Halki.**

41. In **The Halki** Swinton Thomas LJ said at page 760 F to H:
"Mr Waller [counsel for the defendant] submitted that if Mr Hamblen's [counsel for the plaintiff] argument as to the meaning of a dispute is correct then an arbitrator would have no jurisdiction to make an award, either interim or final, in respect of which a defendant had no arguable defence. For example, an arbitrator would have no jurisdiction to make an award in respect of a claim for freight. Furthermore, as an additional absurdity, if an entire claim was submitted to arbitration, the arbitrator would have no power to make an award on those parts of the claim in respect of which there was no arguable defence or no real or genuine dispute, but to make an award in respect of which there was a genuine dispute but in respect of which the defendant's argument failed. This argument seems to me to be compelling, and Mr Hamblen had no real answer to it save to say that it would be unlikely to arise in practice. I have serious doubts about that proposition when applied to a defendant who is anxious to delay payment for as long as possible."

42. Swinton Thomas LJ went on to approve this passage in the judgment of Kerr J in **Tradax Internacional S.A. v Cerrahogullari T.A.S.** [1981] 3 All ER 344, 350:
"The fallacy in the plaintiffs' argument can be seen at once if one considers what would have been the position if the plaintiffs had in fact purported to appoint Mr Barclay as their arbitrator within the time limit of nine months. They could clearly have done so, and indeed any commercial lawyer or businessman would say that is what they should have done under the clause to enforce their claim. Arbitrators are appointed every day by claimants, who believe, rightly or wrongly, that their claim is indisputable. However, on the plaintiffs' own argument, Mr Barclay would have had no jurisdiction, since there was then, as they now say, no 'dispute' to which the arbitration clause could have applied. In my view this argument is obviously unsustainable."

That passage was approved by this court in **Ellerine Brothers (Pty) Ltd v Klinger** [1982] 1 WLR 1375 and followed by Saville LJ in what is an important case in this context, namely **Hayter v Nelson and Home Insurance Company** [1990] 2 Lloyd's Rep 265 at 268.

43. The force of the point can be seen on the facts of this case. I can well understand the submission that the contractor's claim under Certificate No 5 is indisputable and thus, on Mr Robson's argument, would not be subject to arbitration. But the claim in respect of the final account seems to me to be in a different category because no reliance on a Certificate is possible and the contractor has to establish that the amount is "properly due", which gives rise to very different problems on the facts.

44. The second reason, which is related to the first, arises out of the fact that the Housing Grants Act applies to many types of construction contract, including large international construction contracts. The effect of Mr Robson's argument is to deprive the contractor of its right to obtain an arbitration award in

circumstances where the contractor may well prefer to obtain an award enforceable under the New York Convention rather than to obtain a judgment of the English court.

45. The third point is one identified by Saville J in **Hayter v Nelson,** at page 268, where he said this:
"... the assumption is made that arbitrations are necessarily slow processes, but whatever the position in the past, I cannot accept that as a general or universal truth today. As Mr Justice Robert Goff (as he then was) pointed out in ***The Kostas Melas****, [1981] 1 Lloyd's Rep. 18, arbitrators have ways and means (in particular by making interim awards) of proceeding as quickly as the Courts - indeed in that particular case quicker than any Court could have acted. If a claimant can persuade the arbitral tribunal that in truth there is no defence to his claim (ex hypothesi not on the face of it a difficult task if the claim is truly indisputable) then there is no good reason why that tribunal cannot resolve the dispute in his favour without any delay at all."*

46. Mr Robson submits that excessive delay is likely to ensue in cases of this kind if the appeal fails. However, for my part, I do not see why it should not be possible for the president or vice-president of the RICS to appoint an arbitrator within a very short time, or indeed why an arbitrator should not make an interim award on a certificate in short order. Take this case: the only defences so far suggested by Miss Houghton to the claim based on Certificate No 5, were, first, that the certificate was not stated to be a penultimate certificate and, secondly, that the certificate was not issued within 14 days of practical completion. While these are, to my mind, matters for an arbitrator, neither point appears to have any real substance and I can at present see no good reason why an arbitrator should not resolve them very quickly indeed.

47. It may perhaps be noted that the other potential defences suggested by Miss Houghton go to the merits of the underlying claim, which, as the decision of this court in **Rupert Morgan v Jervis** shows, cannot be raised by way of a defence to a claim under section 111, but only in litigation or arbitration subsequently.

48. It is difficult to see what documents would be required before an arbitrator made an interim award under section 111 beyond the contract and the certificate. For my part I do not accept that an application to an arbitrator for an interim award leads, necessarily, to any greater delay than an application for summary judgment in the courts. In any event, if there really are delays of this kind which trouble the parties, the solution would be not to agree arbitration in the first place.

49. The fourth point is that there is nothing in section 111 of the Housing Grants Act to suggest that a dispute arising out of a refusal by an employer to pay a sum wrongfully withheld could not, as a matter of law, be referred to arbitration. The Housing Grants Act and the Arbitration Act were both enacted in 1996. If Parliament had intended to restrict the parties freedom of contract in that way, it could, and no doubt would, have done so. The Scheme applied a modified form of section 42 of the Arbitration Act to adjudications. The Arbitration Act was otherwise left intact. There is nothing in the Housing Grants Act, so far as I can see, to limit the application of section 9 of the Arbitration Act.

50. For all these reasons, I see nothing in section 111 of the Housing Grants Act to entitle the court to refuse to grant a stay under section 9(4) of the Arbitration Act if it would otherwise be granted. Nor do I see anything in the decision of this court in **Rupert Morgan v Jervis** which is relevant to this issue. In that case, following the issue of a seventh interim certificate, the employer disputed part of the sum claimed by a contractor. The contractor sought summary judgment on the basis that the employer had not given a "*notice of intention to withhold payment*" within the meaning under section 111 of the Housing Grants Act. The district judge entered judgment for the builders. The County Court judge dismissed the employer's appeal and so did this court.

51. In the judgment of Jacob LJ, with which Sedley LJ and Schiemann LJ agreed, Sedley LJ set out part of the judgment of Sheriff Taylor in **Clark Contracts Ltd v The Burrell Co (Construction Management) Ltd** [2002] SLT (ShCt) 103 including the following:
"There was no dispute that the architect had issued an Interim Certificate. It therefore seems to me that the defenders became entitled to payment of the sum brought out in the Interim Certificate within 14 days of it being issued. In my opinion that is an entitlement to payment of a sum due under the contract. In order to reach the figure in the Interim Certificate one has made use of the contractual mechanism. ...

The interim certificate is not conclusive evidence that the works in respect of which the pursuers seek payment were in accordance with the contract (see Clause 30.10). That however does not preclude the sum brought out in an Interim Certificate being a sum due under the contract. The structure and intent of the Act, as I understand it, and accepted by [the solicitor for the defendant], is to pay now and litigate later."

52. Jacob LJ said in paragraph 14 that Sheriff Taylor's analysis, once articulated, was obviously right. He then set out its advantages, including the fact that it preserves the contractor's cash flow but does not prevent the employer who has not issued a withholding certificate from raising the disputed items in adjudication or even legal proceedings or, he might have added, in arbitration; see also per Sedley LJ at page 1872, paragraph 17, in relation to the Scheme generally.

53. The remaining question which arises is whether there is a dispute which the parties have agreed to refer to arbitration. The clause is in wide terms. There is no doubt that if there is a dispute between the parties it is within the scope of the clause. In this regard we were referred to a considerable number of decisions on the existence or otherwise of a dispute in the course of oral argument yesterday. A number of different, and not entirely consistent, strands of thought can be discerned in them. There are, I think, a number of such strands.

54. In particular they include these: (1) A dispute requires both a claim and a rejection **Monmouthshire County Council v Costelloe & Kemple** [1977] 5 BLR 83.

55. (2) Such rejection is not necessary. As it was put by Templeman LJ in **Ellerine Brothers (Pty) Ltd v Klinger** at page 1381:
"... it seems to me that ... if letters are written by the plaintiff making some request or some demand and the defendant does not reply, then there is a dispute. It is not necessary, for a dispute to arise, that the defendant should write back and say 'I don't agree'. If, on analysis, what the plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the arbitration agreement, then the applicant is entitled to insist on arbitration instead of litigation."

That approach received support from the reasoning of the majority in **The Halki.**

56. (3) In **Fastrack Contractors Ltd v Morrison Construction Ltd & Anr** [2000] 1 BLR 168, HHJ Thornton QC sought to reconcile the above cases by deriving this principle at paragraph 27:
"A 'dispute' can only arise once the subject-matter of the claim, issue or other matter has been brought to the attention of the opposing party and that party has had an opportunity of considering and admitting, modifying or rejecting the claim or assertion."

57. (4) In two cases, namely **Ken Griffin v John Tomlinson T/a K & D Contractors v Midas Homes Ltd** (unreported) 21st July 2000, and **Sindall Ltd v Solland & Ors** (unreported) 15th June 2001, HHJ Humphrey Lloyd QC introduced the notion that adjudication was intended to resolve what has not been settled by the normal process of discussion and agreement. In that regard he said in the Ken Griffin case that a dispute was not likely to be inferred. That approach was, at least to some extent, reflected in the decision of HHJ Seymour QC in **Edmund Nuttall Ltd v RG Carter Ltd** [2002] 1 BLR 312 and by Forbes J in **Beck Peppiatt v Norwest Holst** [2003] 1 BLR 316.

58. (5) There are cases in which a dispute has been held not to exist where one party has simply sought further information and not made a claim, or where the party has not given enough information to enable the other party to decide whether or not to admit the claim. Examples are **Cruden Construction Ltd v Commission for the New Towns** [1995] 2 Lloyd's Rep 387 per HHJ Gilliland QC and **Carillion Construction Ltd v Devonport Royal Dockyard** [2003] 1 BLR 79 per HHJ Peter Bowsher QC.

59. (6) In two cases, namely **Cowlin Construction Ltd v CFW Architects (A firm)** [2003] 1 BLR 241 and **Orange EBS Ltd v ABB Ltd** [2003] 1 BLR 323, HHJ Frances Kirkham, in careful judgments in which, as I read them, she referred to many if not at all the cases, recognised that they are not all entirely consistent and preferred the test in **The Halki** following the approach of Templeman LJ in **Ellerine v Klinger.**

60. (7) After the conclusion of the argument, as promised by Miss Houghton, we were sent a copy of the decision of HHJ Moseley QC in **Lovell Projects Ltd v Legg and Carver** [2003] 1 BLR 452 which essentially followed **The Halki** in much the same way as HHJ Kirkham had done.

61. More importantly, we learned of a judgment of Jackson J delivered on 11th October 2004 in **AMEC Civil Engineering Ltd v The Secretary of State for Transport.** In the course of that judgment he considered many of the cases to which we have been referred, namely **Monmouthshire County Council v Costelloe, Tradax International v Cerrahogullari, Ellerine v Klinger, Cruden Construction Ltd v Commission for the New Towns, Halki, Fastrack Contractors Ltd v Morrison Construction Ltd, Sindall Ltd v Solland** and **Beck Peppiatt Ltd v Norwest Holst Construction Ltd.**

62. In paragraph 68 Jackson J said this:

"From this review of the authorities I derive the following seven propositions:

"1. The word 'dispute' which occurs in many arbitration clauses and also in section 108 of the Housing Grants Act should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.

"2. Despite the simple meaning of the word 'dispute', there has been much litigation over the years as to whether or not disputes existed in particular situations. This litigation has not generated any hard-edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.

"3. The mere fact that one party (whom I shall call 'the claimant') notifies the other party (whom I shall call 'the respondent') of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.

"4. The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.

"5. The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.

"6. If the claimant imposes upon the respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding.

"7. If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication."

63. For my part I would accept those propositions as broadly correct. I entirely accept that all depends on the circumstances of the particular case. I would, in particular, endorse the general approach that while the mere making of a claim does not amount to a dispute, a dispute will be held to exist once it can reasonably be inferred that a claim is not admitted. I note that Jackson J does not endorse the suggestion in some of the cases, either that a dispute may not arise until negotiation or discussion have been concluded, or that a dispute should not be likely inferred. In my opinion he was right not to do so.

64. It appears to me that negotiation and discussion are likely to be more consistent with the existence of a dispute, albeit an as yet unresolved dispute, than with an absence of a dispute. It also appears to me that the court is likely to be willing readily to infer that a claim is not admitted and that a dispute exists so that it can be referred to arbitration or adjudication. I make these observations in the hope that they may be of some assistance and not because I detect any disagreement between them and the propositions advanced by Jackson J.

65. On the facts of this case the answer to the question whether there was a dispute between the parties at the time these proceedings were commenced does not depend upon the kind of distinctions drawn in some of the cases. To my mind it is plain that long before 22nd December 2003, when the claim form was issued, the employer did not admit the claimant's claim. Applying the principles set out by Jackson J a dispute existed by then.

Conclusion

66. It follows that in my judgment the employer was entitled to a stay of the proceedings under section 9 of the Arbitration Act. That applies to the whole of the proceedings; that is in respect both of the claim under the certificate and the claim for the monies in the final account. As to the claim for the amount certified in Certificate No 5, my conclusion follows from the decision and reasoning in **The Halki.** As to the remainder, it is difficult to see that the employer would not have been entitled to a stay even if **The Halki** had been decided differently, which it was not.

67. For these reasons I would dismiss the appeal.

MR JUSTICE NEUBERGER: I agree that this appeal should be dismissed for the reasons given by Clarke LJ. I also agree with his analysis of the proper approach to be adopted in order to determine whether a dispute has arisen for the purposes of section 108(1) of the Housing Grants Act or indeed under an arbitration agreement.

68. I had some concerns about the notion that, in a case such as this, where the employer had failed to serve an effective notice of intention to withhold payment ("a Notice") in respect of a certificate under section 11, which would have triggered the right of the contractor to refer the dispute to adjudication under section 108, the contractor would still have to invoke his right under section 108 (if he did not elect to go to arbitration) before he could enforce, through the courts, any right to recover under the certificate. However, it seems to me that the answer to that apparent paradox is that the issue before the adjudicator would be very different. If the employer had served an effective Notice, then the adjudicator would have had to consider (a) the merits of the proposed withholding and (b) the grounds thereof, both of which would be specified in the notice pursuant to section 111(2). However, where, as here, the employer has served no effective Notice, the issues which it could raise before the adjudicator would at best, from the employer's point of view, be very limited indeed.

69. In those circumstances, it seems to me that such points, if any, as the employer could raise before the adjudicator in a case such as this, could very quickly be dealt with in almost any case by the adjudicator.

70. Further, it is not as if any decision of the adjudicator could only be enforced, in a case such as this, through the medium of arbitration. It could be enforced immediately through the court, as was indicated by Dyson J in **Macob Civil Engineering Ltd v Morrison Construction Ltd** [1999] 1 BLR 93 at 100, especially second column (see also sections 42 and 66 of the Arbitration Act 1996).

LORD JUSTICE BROOKE: I also agree with the judgment of Clarke LJ.

ORDER: appeal dismissed; costs to be the subject of detailed assessment unless agreed.

MR J ROBSON (instructed by Thackery Williams) appeared on behalf of the Appellant.
MISS K HOUGHTON (instructed by Piper Smith Watton) appeared on behalf of the Respondent