

JUDGMENT : Recorder David Blunt QC : TCC. 5<sup>th</sup> April 2004

### THE PROCEEDINGS

1. These proceedings are brought under the provisions of Part 8 of the Civil Procedure Rules with the object of enforcing two Adjudication Decisions. The claim is resisted on the basis of an entitlement to set off cross-claims for Liquidated Damages. That entitlement is in dispute.

### ABBREVIATIONS

2. In this Judgment, the following abbreviations are used:
  - (1) **Conor Engineering** Limited, the Claimant (“CEL”);
  - (2) Les Constructions Industrielles de la Méditerranée (CNIM) SA, the Defendant, (“CNIM”);
  - (3) the Housing Grants, Construction and Regeneration Act 1996 (“the Act”);
  - (4) the Scheme for Construction Contracts (England and Wales) Regulations 1998, (“the Scheme”);
  - (5) Mr. Brian Wallis Totterdill, the adjudicator appointed by agreement between the parties to adjudicate in respect of the two disputes referred to adjudication by CEL, (“the Adjudicator”);
  - (6) the decisions produced by the Adjudicator on the disputes referred to him on 1 December 2003; (“the Decisions”);
  - (7) Liquidated Damages, (“LADs”);
  - (8) the Boiler Contract and the Pipework Contract (“the Contracts”);
  - (9) Notice of Intention to withhold payment (“withholding notice”).

### BACKGROUND

3. CNIM was the main contractor employed by Hampshire Waste Services Ltd to design, build and deliver a plant at Chineham, Hampshire for the incineration of waste and the generation of electricity.
4. CNIM sub-contracted certain elements of these works to CEL under, inter alia, two contracts:
  - (1) the first contract (“the Boiler Contract”) dated 13.7.2001, was for the installation of certain boiler works and incorporated CNIM's general terms and conditions for construction works;
  - (2) the second contract (“the Pipework Contract”) dated 23.11.2001, was for the installation of pipework and incorporated CNIM's Contract for Piping Works, the terms of which in all material respects are effectively identical (or very similar) to the terms of the Boiler Contract.
5. The Boiler Contract was completed on 8 July 2002 and the Pipework Contract was completed on 11 November 2002. On 25 November 2003, CEL served Notices of Adjudication in respect of both Contracts. By a letter of 28 November 2003, CNIM agreed to the appointment of the Adjudicator. The Adjudicator accepted the appointment on 3 December. Claims for LADs advanced by CNIM were referred to the Adjudicator. However the Adjudicator declined to address them on the ground that they had not previously been notified to CEL and that accordingly that they were not then in dispute.
6. The Adjudicator, in Decisions, which were both dated the 16 January 2004, directed inter alia:
  - (1) payment by CNIM to Conor of £105,814.35 (plus such VAT as might be applicable) within 14 days of the date of the Decision;
  - (2) payment by CNIM to Conor of £69,339.16 (plus such VAT as might be applicable) within 14 days of the date of the Decision.
7. According to a letter from the Adjudicator dated 17 January 2004, the Adjudicator sent the Decisions to the parties by special delivery post on Saturday 17 January 2004. CNIM received the Decisions by fax on 19 January and by courier on 20 January 2004. CNIM did not comply with the directions for payment but sent to CEL notices claiming a right to withhold payment on the grounds of an entitlement to LADs and a right of set-off. These notices were sent in letters dated the 26 January 2004 sent as attachments to an email on 26 January 2004 and by post on the 27 January 2004.
8. CNIM's claim for LADs (presently adjusted to reflect the Adjudicator's decision in respect of the Boiler Contract and a previous Decision in respect of the Pipework Contract) are:
  - (1) in respect of the Boiler Contract, £134,227.76;
  - (2) in respect of the Pipework Contract, £84,367.18.

### CEL'S CONTENTIONS

9. CEL disputes CNIM's entitlement to enforce the LADs provisions on the grounds that they amount to a penalty and thus are not enforceable. Although they do not intend to argue this point in these limited enforcement proceedings, they reserve the right to pursue these objections to the LADs provisions at a later stage.
10. CEL rely upon Section 111 of the Act, the terms of which are 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 ... “*
11. Alternative grounds are advanced. CEL's primary case is that pursuant to section 111(2) of the Act CNIM had to serve valid withholding notices in respect of its claims for LADs, “not later than the prescribed period before the final date for payment”. Section 111(3) enables the parties to agree what the prescribed period shall be. There being no such agreement, the period was provided by the Scheme as being not later than 7 days before the final date for payment (see para 10 of Part II). CEL contend that the final date for payment in this case was as decided by the Adjudicator as being within 14 days of the decision, namely 30 January 2004, accordingly the final date for issuing a withholding notice was no later than 23 January 2004, and that CNIM had not served any valid notice in time.
12. The secondary argument advanced by CEL is that even if the Act did not apply, the Contracts imported the provisions of Section 111 of the Act, and that accordingly the same timetable applied, so that the result would be the same.

### CNIM'S CONTENTIONS

13. CNIM's case in summary is that:
  - (1) The Contracts, being concerned with power generation, fell outside the ambit of the Act by virtue of the exclusionary provisions of Section 105(2)(c), the terms of that provision being:

*“105(2) The following operations are not construction operations within the meaning of this Part - ...*

*(c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is -*

*(i) nuclear processing, power generation or water or effluent treatment, or*

*...”*
  - (2) The Adjudications therefore were governed exclusively by the terms of the Contracts. Accordingly, any timeframe within which notices to withhold must be given, as prescribed by the Act, was not applicable. The Contracts set no time limit for notices to withhold LADs and provided no “sanction” for a failure to give notice of the kind described in Section 111(1) of the Act.
  - (3) If the relevant questions did fall within the ambit of the Act, the notices to withhold LADs were valid and served in time because
    - (i) the dates of payment directed by the Adjudicator were not the final dates for payment within the meaning of Section 111(2);
    - (ii) in any event, time did not begin to run from the Decisions until they had actually been received.
  - (4) Further, CEL subsequently extended the date for due payment, or waived the right to insist on the period which they have relied upon, by sending invoices to CNIM which were dated 31 January 2004 and provided a payment period of 30 days from that date.

**CONTRACT PROVISIONS**

14. The relevant provisions are clauses 22, 23.2, 25 and 31. In the Boiler Contract these provisions, in so far as they are relevant, are as follows:

*“22. INVOICING TERMS*

*Three copies of the invoice showing all the Contract references must be sent along with all the documents proving that the obligations of the Contractor have been performed.*

*An invoice can only refer to one sole Contract and one sole term of payment.*

*23.2 CONDITIONS OF PAYMENT*

*It is a condition precedent to any payments being made to the Contractor under the Contract that the Contractor shall have provided to CNIM the following documentation ...*

*(d) Properly prepared invoice(s) as required in Clause 22 ...*

*Payment by CNIM shall be effected by bank transfer sixty (60) Days after the end of the month in which invoice is received; any bank charges in respect of the Contractor’s bank shall be borne by the Contractor ...*

*25.1 LIQUIDATED DAMAGES FOR DELAY*

*... Liquidated damages shall apply and be payable without prior notice from CNIM’s Representative. CNIM may retain the amount of liquidated damages due and set off these against any payment due to the Contractor.*

*31.1 SETTLEMENT OF DISPUTES*

*If a dispute or difference arises under or out of the Contract either Party may at any time give notice of his intention to refer such dispute or difference to adjudication under this Clause and may within seven days thereafter refer the same to the decision of the adjudicator (“the Adjudicator”) ...*

*31.6 The Adjudicator’s decision is binding upon the Parties until finally determined by legal proceedings or by agreement.*

*...*

*31.8 If either party does not comply with the decision of the Adjudicator the other party shall be entitled to take proceedings in the Courts to secure such compliance pending any final determination of the referred dispute or difference pursuant to Sub-Clause ...*

*...*

*31.13 The Adjudicator shall decide the matters in dispute. He may take into account any other matters which the Parties to the dispute agree should be within the scope of the adjudication connected with the dispute. In particular, he may:*

*(a) decide that any of the Parties to the dispute is liable to make a payment under the Contract (whether in sterling or some other currency) and subject to section 111(h) of the Housing Grants, Construction and Regeneration Act 1996, when that payment is due and the final date for payment.*

*(b) ...”*

15. The terms of the Pipework Contract differ only in that the period of credit specified in clause 23.2 is 45 days rather than 100.

**SECTION 105(2)**

16. As is apparent from the terms of this provision [see paragraph 13(1) above] the issue is whether the operations being undertaken by CEL for CNIM were being carried out *“on a site where the primary activity is ... power generation”*.
17. The parties are agreed that *“the site”* means the whole of the Chineham Incinerator site, and cannot be limited to the area where CEL’s operations were actually performed - see *ABB Zantingh Limited v. Zedal Business Services Limited* [2001] BLR 66 (*“Zantingh”*).
18. It appears that the site had been previously used for waste disposal but that such use had ceased to enable the new waste incinerator and electricity generation plant to be built. This gives rise to the question whether it could be said that the site was one where the primary activity was either waste disposal or power generation when, because the plant was being built, neither of those activities could take place. This problem arises out of the use in Section 105(2)(c) of the word *“is”*. His Honour Judge Humphrey Lloyd QC considered this point in *ABB Power Construction Ltd v. Norwest Holst Engineering* 77 Con.L.20. In argument Counsel for the Claimant pointed out that it would make little sense if work done to improve an existing complex would be exempt whilst work for a new project would not, and

the Learned Judge endorsed that argument, stating that such a result would be an absurdity. I respectfully agree with that conclusion. In my judgment "is" in this provision means "is, or will be".

19. In *Zantingh*, a case where diesel powered generating stations were built on sites principally dedicated to printing, His Honour Judge Peter Bowsher QC stated (at paragraph 34 at page 73 and 2):

*"When Parliament refers in section 105(2) to "a site where the primary activity is ..." the reference must be to a place broader than a generator surrounded by a security fence. To make any sense of the Act, one has to look to the nature of the whole site and ask what is the primary purpose of the whole site? Is the primary purpose power generation, or, in this case, printing?"*

20. The wording in the section under consideration is "**the primary activity**" (my emphasis). What is "**the primary activity**" at a particular site is a question of fact. Whilst I accept that the primary purpose of a site will always be a relevant consideration in deciding what is its primary activity, it is possible to imagine situations which could give rise to an argument that an activity embarked upon for only secondary reasons is in fact (e.g because of its scale or output, etc) the primary activity.

21. The plant was built for Onyx UK as part of an integrated waste management strategy called "Integra". This is explained in a witness statement from a Mr. Cox, a Project Manager employed by CEL as follows:

*"12. My understanding is that 'Integra' is a reference to 'Project Integra', which is the name given to Hampshire County Council's integrated waste management strategy. The strategy is being implemented by Hampshire Waste Services Limited, a subsidiary of Onyx UK, with whom CNIM contracted to provide the Chineham incinerator plant ...*

*13. This waste management strategy includes the provision of 3 incinerator plants, ... located at Chineham (which was the subject of the adjudications between CEL and CNIM), Portsmouth and Marchwood.*

*14. At KHC1 pages 2-4 I attach copies of pages from the Project Integra website which summarises the aims and objectives of the project."*

22. Exhibit KJC1 includes the following information:

"..

#### **BACKGROUND**

*At the end of the 1980s it became clear that Hampshire was facing a waste disposal crisis as landfill sites were rapidly filling up, incinerators built in the 1970s were not going to meet new EU emission regulations, and waste levels were continuing to increase ...*

*Project Integra was formed on the basis of the following seven point action plan:*

- 1. Action on waste minimisation*
- 2. Action on composting*
- 3. Action on recycling*
- 4. Support for anaerobic digestion*
- 5. Use of recovery technologies, including incineration*
- 6. 3 to 5 waste processing facilities (not exceeding 200,000 tonnes per annum)*
- 7. Residual waste to landfill.*

#### **RESULTS**

*To date Project Integra has achieved a collective recycling rate of over 25% (2000/2001), with over 90% of Hampshire's households having access to a kerbside collection of recyclables.*

*Developments have been made in terms of infrastructure with the provision of*

*\* 2 Materials Recovery Facilities (1 operating in Portsmouth, another has planning permission - to be built in Alton in 2003)*

*\* 3 centralised composting sites*

*\* 9 transfer stations*

*\* A network of 26 Household Waste Recycling Centres*

*\* 3 Energy Recovery Incinerators - not operating at the moment, but to be completed within the next few years*

*..."*

23. The plant at Chineham is described in another extract from the web-site to which I was referred and on which both counsel relied:

*“The management and staff of Integra North ERF are among the most highly qualified and experienced in the sector. Household waste is sent to an energy recovery facility where it is tipped into a bunker. A crane grabs the waste and places it into the feed hopper. It then drops down a feed chute onto the grate. The action of the grate turns the waste to allow it to burn fully. The burnt out ash passes through the ash discharger onto an ash handling system, which extracts metal for recycling. The remaining ash is sent for recycling or disposal. Hot gasses produced in the combustion process pass through a water tubed boiler where they are cooled. The heated water becomes steam. A turbo-generator uses the steam to produce electricity for export to the National Grid. The gasses from the boiler go through an extensive flue gas cleaning process. This consists of a gas scrubber where lime milk is injected to neutralise acid gasses; then activated carbon is added to remove other pollutants; and finally a bag filter where any remaining particulars are filtered out. The resulting material known as Air Pollution Control Residue (APCR) is sent for disposal at a licensed site. The cleaned gasses are finally released to the atmosphere through the chimney.*

...

***How the power is generated***

*The output steam from the heat recovery boiler is fed into the steam turbine. It enters the turbine at high pressure (45 BAR) and leaves the turbine at partial vacuum. After the turbine the condenser turns the steam back into water, which is recycled within the facility. The output shaft of the turbine is controlled to the generator via a reduction gearbox. The generator is water cooled and specifically designed for minimal maintenance. The electricity flows through underground cable at 11,000 volts to Basingstoke substation and then to the National Grid. Integra North provides 8MW of electricity to the National Grid, enough to power more than 8,000 local homes.*

***Technical details of the plant***

*\* Refuse throughout - 90,000 tonnes per annum in 12 tonnes per hour refuse burning steam*

*\* Storage capacity - four days full plant capacity*

*\* Number of tipping bays - 5*

*\* Steam output - 37.5 tonnes of steam per hour at 400oC and 45 BAR*

*\* Flue gas treatment - CNIM semi-dry line scrubber followed by high performance bag filters, discharging into a 65 metre high chimney*

*\* Energy produced - maximum generating capacity 8MW ...”*

24. CEL's case is that the primary activity on site is the incineration of domestic waste and not power generation. It is accepted that some energy is generated through the production of electricity as part of the incineration process but this is a “spin off” or by-product of the incineration. It is not the primary activity on the site.

25. CEL places reliance on the description given to the main contract works and the site in both contracts:

(1) The recital to the Boiler Contract states that:

*“CNIM is to design, build and deliver a Waste Incineration Plant”*

The Pipework Contract recital is identical and the same words also appear at clause 1.

(2) The site is defined in the Boiler Contract as *“Chineham Incinerator site”* in Basingstoke. The Pipework Contract contains a similar definition.

(3) The client is defined in both Contracts as *“Hampshire Waste Services Ltd”*.

(4) The Technical Requirement Specification to the Pipework Contract identifies the installation site at clause 2 as:

*“Integra North Energy Recovery Facility*

*Chineham Incinerator Site*

*Whitmarsh Lane Hampshire ... ”*

26. CNIM's case on the facts is set out in statements from Mr. Rosher, a lawyer acting on behalf of CNIM and from Mr Fontaine, CNIM's Power Plants director. Mr. Rosher states:

*“2.2 The site at Chineham was established to generate energy through the production of electricity. In order to achieve this power generation, CNIM contracted with CEL to install the boiler and to assemble the piping which CNIM was to prefabricate offsite. The boiler and pipework works are fixed there for the purpose of generating power which is (as set out above) the primary purpose of the site as a whole; if power generation had not been the primary purpose, the plant would have simply been fitted as a simple furnace, without the boiler and piping.*

*2.3 The boiler and pipeworks installation operations carried out by CEL are very specialised and specific to power generation plants. As explained by Mr. R?, the manager at CNIM responsible for coordinating all sub-contracts on the Chineham project, “CEL was first approached by CNIM in relation to the boiler erection package because of their expertise in the maintenance of power plants in the United Kingdom ...*

*2.4 The function or purpose of the boiler is to create steam to feed a turbine which is coupled with an alternator, the purpose of which is to create electricity. The purpose of the piping is to convey the various substances (air, water and steam) that are mainly used for the boiler to the turbine. This is a highly specialised type of engineering work carried out by the contractors experienced in the power generation sector.*

....

*2.5 The Main Contract Agreement entered into between CNIM and its client for the creation of the plant is stated to be for an “Energy From Waste Plant”. Schedule 7 of the Main Contract Agreement provides Performance Guarantees which requires at sub clause 7.4.1.3 that “energy recovery is achieved through the production of electricity”. Similarly, Schedule 10 provides a right to Liquidated Damages for lack of electricity production and for failure to reach a certain level of processing capacity (Exhibit 2).*

...

*2.7 CEL’s piping work was to install high pressure steam piping, associated equipment: and machinery equipment. As mentioned above, this machinery is power generation machinery specific to the power generation industry. The piping works constitute a vital part of the power generation process. ...*

...

*2.10 ...The pipework is an essential part of the plant assembled and installed at the Chineham site, without which, the individual pieces of machinery and equipment would be unable to operate to generate power.”*

27. The responsive statement from Mr. Cox asserts:

*(1) his understanding of the Chineham Project, namely that it was for the design, build and delivery of a Waste Incineration Plant and that the primary activity was the burning of domestic waste;*

*(2) that the generation of electricity was only a “spin off”, the size of the turbines being such that the income generated from the sale of energy to the National Grid would not cover the costs of operating the plant.*

He also takes issue with Mr. Rosher's contention that all of the work carried out by CEL at Chineham was specific to the generation of electricity. However, this does not seem to me to be directly material, since I am not concerned with any issue as to the primary purpose of CEL's works or as to the primary activity, on site, of CEL.

28. Mr. Cox's responsive statement produced a further riposte from Mr. Fontaine of CNIM:

*“6. The boiler and pipework contracts were for a site where the primary activity is power generation. In his Statement, Mr. Cox ignores entirely the fact that if power generation had not been the primary purpose, the plant would just have been fitted as a simple furnace, without the boiler and piping. Indeed, I would mention here that the Chineham Plant was built to replace a former waste incineration plant at the same site: demolition of the old incinerator was necessary as it was not possible to associate energy recovery with the existing plant.*

*7. The picture which Mr. Cox now seeks to paint at paragraphs 6 to 7 of his Statement in the context of these enforcement proceedings contrasts strikingly with statements made in his first Witness Statement submitted in the adjudication (a copy is annexed at Exhibit 1 hereto) and, in particular, paragraphs 6 to 10 where Mr. Cox stated, for example, that once “constructed the Plant was to generate electricity through the incineration of municipal waste” and the “process of burning the waste generates energy which heats water, converting it to steam at ultra high temperate and pressure which drives a turbine capable of providing 6 megawatts of electrical output.”*

8. *The boiler and pipeworks installation operations carried out by CEL were very specialised and specific to power generation plants...*

9. *Contrary to what is stated by Mr. Cox, the generation of electricity is not a mere "spin off": the sale price of electricity production covers the cost of the investment of the energy recovery plant and operational costs (including manpower, consumables, etc) linked to this energy production. Revenue from electricity sales to the National Electricity Board is approximately £50 for each MWe. The turbine/alternator power is 8.8 Mwe. Considering that only a small part of power generated is used for the plant equipment (about 10%), most of the electricity generated is sold. By my calculations, the revenue is therefore approximately £3 million a year, taking into account at least 90% of availability of the plant which is our warranty ..."*

He responds in detail in relation to the question of whether or not all of CEL's work was specific to the generation of electricity. As stated, I do not consider this to be directly material.

29. Mr. Fontaine also relies on the information on the Project Integra website:

*"11. ... The pages at Exhibit 2 make numerous references to the new Chineham facility as an "energy recovery incinerator" or an "Energy Recovery Facility (ERF)", the term used to describe this type of plant and a term which is self-explanatory. For example:*

*(i) "The waste is taken to an Energy Recovery Incinerator ... The steam produced is used to drive generators which produce electricity. This is passed into the National Grid through cables. This whole process is known as Energy Recovery Incineration".*

*(ii) "The Chineham ERF is at the forefront of energy recovery technology ..."*

*12. In my respectful submission, this cannot leave the reader in any doubt as to the primary purpose of the facilities; the purpose of the plant is to transform the waste into electricity. The extract from the Technical Requirement Specification exhibited at JKC1 (page 1) to Mr. Cox's Statement plainly refers to the Chineham Plant as "Integra North Energy Recovery Facility."*

30. The entirety (apart from some graphics) of the additional page on the website to which Mr. Fontaine refers is in the following terms:

**ENERGY RECOVERY INCINERATION**

*The local council refuse collection vehicles pick up household waste that has not been recycled from outside people's homes.*

*The waste is taken to an Energy Recovery Incinerator. The refuse collection vehicles tip the waste into a storage bunker. From here it is fed into the furnace of the incinerator.*

*As the waste is burnt at a very high temperature, a lot of heat and gases are given off. The gases are cleaned using filters before being discharged into the atmosphere. The heat is used to turn water in pipes surrounding the furnace into steam.*

*The steam is used to drive generators which produce electricity. This is passed into the National Grid through cables.*

*This whole process is known as Energy Recovery Incineration."*

31. Mr. Hughes, on behalf of CNIM, sought to persuade me, by reference to various extracts from Hansard, that it was the intention of Parliament to exclude operations associated with power generation because such activity is concerned with precision engineering and specialist scientific plant and that a power generation facility therefore could not cease to fall within 105(2)(c) simply because it is fuelled by domestic waste.

32. Whilst I read the extracts from Hansard de bene esse, it does not seem to me

(1) that they were admissible aids to construction having regard to the clear wording of Section 105(2)(b) of the Act and to the stipulations in the speeches in the House of Lords in *Pepper v. Hart* [1999] 1 All ER 42 that Hansard should not be referred to except in the case of genuine ambiguity; or

(2) in the light of the fact that Parliament enacted Section 105(2) in the terms which it did, that they provided support for the broad proposition which Mr. Hughes sought to advance.

33. On the basis of information contained in the extracts from this website and the contracts to which I have referred, I am satisfied and find as a fact that:

- (1) the prime purpose of the plant built at Chineham was the incineration of waste; and
- (2) that the principal physical activity at the site was also the incineration of waste.

I am quite satisfied that the plant was developed principally as a means of finding alternatives to landfill sites for the purpose of disposing of waste. I am impressed by the sheer volume of waste incinerated annually at the Chineham site as contrasted with the modest output of electricity which is generated. I accept Mr. Cox's assertions that the generation of electricity was simply "a spin off" from the incineration process. It may be appropriate to refer to the plant as an "Energy Recovery Incinerator", but this does not lead to the conclusion that its principal purpose was power generation. Accordingly I am satisfied and find as a fact that power generation was and is not the "primary activity" on the site within the meaning of Section 105(2)(c)(i) of the Act.

## FINAL DATE FOR PAYMENT

### The Parties' Submissions

34. The relevant provisions of Section 110 of the Act are as follows:
  - "(1) Every construction contract shall*
  - (a) provide an adequate mechanism for determining what payments become due under the contract, and when, and*
  - (b) provide for a final date for payment in relation to any sum which becomes due.*
  - The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment ...*
  - (3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1) ... the relevant provisions of the Scheme for Construction Contracts apply."*
35. CEL's primary submission is that the dates for the payments specified by the Adjudicator in his two Decisions are "final" dates for payment within the meaning of Section 110.
36. Mr. Rosher, in his witness statement (paragraph 4.4) states that the Contracts do not spell out a mechanism for calculation of a final date for payment of sums due thereunder. On this basis CNIM asserts that since the Contract does not provide a final date for payment, Part II of "the Scheme" applies [see section 110(3) of the Act], that the effect of this is that the final date for payment in relation to each of the Contracts was 17 days from the date of the Adjudicator's Decisions, and that accordingly its withholding notices were in time.
37. CNIM's alternative argument (assuming that the date by which the Adjudicator ordered payment was "the final date for payment"), is that the effective date of a Decision is the date when it is received, that in the present case the Decisions were not received until the 19th January 2004, that accordingly the last date for the service of effective withholding notices was the 26th January 2004, and that the notices emailed on that date were sufficient and in time.
38. The relevant provisions of Part II of the Scheme are paragraphs 8 and 10:
  - "Final date for payment*
  - 8.(1) Where the parties to a construction contract fail to provide a final date for payment in relation to any sum which becomes due under a construction contract, the provisions of this paragraph shall apply.*
  - (2) The final date for the making of any payment of a kind mentioned in paragraphs 2, 5, 6 or 7, shall be 17 days from the date that payment becomes due."*

[The kinds of payments mentioned in paragraphs 2, 5, 6 or 7 are instalment or stage payments, final payments, payment of the contract price, and any "other" payments due under a construction contract.]

  - "Notice of intention to withhold payment*
  - 10. Any notice of intention to withhold payment mentioned in section 111 of the Act shall be given not later than the prescribed period, which is to say not later than 7 days before the final date for payment determined either in accordance with the construction contract, or where no such provision is made in the contract, in accordance with paragraph 8 above."*
39. CNIM's primary contention, as I understand it, is that:
  - (1) payment of the sums awarded by the Adjudicator became due on the date when the Decisions were made, i.e on the 16 January 2004;



(2) by virtue of paragraph 8(2) of the Scheme, the date for final payment was 17 days from that date (which would be on the 2 February), and that valid withholding notices could be served 7 days before then (which would be on the 26 January);

(3) the withholding notices attached to the email sent on the 26 January were valid and effective.

40. CEL's response (if its primary submission is rejected) is that the payments claimed under the contracts became due before the Adjudicator gave his Decisions, and, indeed, before he was appointed. CEL also contends that, in any event, attachments to emails are not in an appropriate form for the purpose of Section 111 of the Act.

#### CEL'S PRIMARY SUBMISSION

41. Clause 31.13 in each of the Contracts (see paragraph 14 above) empowered the Adjudicator:

(1) to decide the matters in dispute, and in particular,

(2) to "decide that any of the Parties is liable to make a payment under the Contract and ... when that payment is due and the final date for payment ..."

42. Whilst it appears that the Adjudicator was not requested to make and did not make any explicit finding as to the final dates for payment, it seems to me that he must be taken to have done so.

43. The adjudication provisions in these Contracts do not confer any special powers upon an adjudicator. Accordingly, the Adjudicator's powers were essentially declaratory of the parties' rights. For example, he had no power to give time to CNIM if it was liable to make a payment to CEL.

44. I do not agree with Mr. Rosher that the Contracts do not spell out a mechanism for calculation of a final date for payment of sums due thereunder. Clause 23.2 [see paragraph 14 above] requires all payments to be made a specified number of days after the end of the month in which any invoice, prepared as required in clause 22, is received. Clause 23.2, therefore, provided a mechanism for the calculation of a final date for payment.

45. In the notice referring its claims to the Adjudicator, CEL advanced claims for payment of sums allegedly due and for interest thereon. There is only a limited reference to invoices in the Decisions, and the Adjudicator made no findings as to when specific sums which he ordered to be paid had become due. He directed that CNIM should make the payments which he found to be due to CEL within 14 days of the date of his Decisions. It seems to me that he must be taken to have decided, rightly or wrongly, that that was the final date under the terms of the Contracts (or of Part II of the Scheme if he thought it applied) when those payments fell to be made. It is of course, trite law that even if this view were erroneous in fact or in law the Adjudicator's Decisions would not be invalidated.

46. If this is right, then any withholding notice should have been served at the latest not later than 7 days before the expiry of the 14 days.

47. It is common ground that if the 7 day period for the service of an effective withholding notice runs from the date when the Decisions were made, CNIM needed to serve such a notice on the 23 January 2004 at the latest, and it is common ground that this was not done.

48. However, as already indicated, CNIM contend that the 14 day period for payment allowed by the Adjudicator should run from the date when the Decisions were received (essentially because it would be impossible to act on them before they were), that this was on the 19 January 2004, and accordingly that the letters attached to the email sent on the 26 January 2004 were in time.

49. I consider this argument to be unsustainable. In each of the Decisions the Adjudicator;

(1) ruled that "CNIM shall pay CEL the following sums within 14 days of his decision"; and

(2) stated that the decision was made on the 16th day of January 2004.

50. As is apparent from my rejection of CNIM's contentions, it is unnecessary to consider CEL's further interesting argument that the email and attachments sent by CNIM on the 26 January 2004 was not in

any event in a form which was sufficient to be an effective withholding notice for the purposes of Section 111 of the Act.

**EXTENSION AND/OR WAIVER OF PERIOD**

51. CNIM further submits that CEL subsequently extended the date for due payment of the Decisions by invoices dated 31 January 2004 sent to CNIM by fax on 16 February 2004 or alternatively thereby waived the right to insist upon any shorter period. The invoices provided a payment period of 30 days from 31 January 2004. It is submitted that CEL thereby agreed to an extension of time for the final date of payment of the sums due under the Decisions until 1 March 2004, that consequently, the time by which notices to withhold would need to be served under the Act is, at a minimum, 7 days before the final date for payment, i.e 23 February 2004, and that accordingly, the notices to withhold served on 26 January 2004, were served well within time.
52. These submissions as, it seems to me, are faced with the insurmountable obstacle that the current proceedings were commenced on the 6 February 2004, having been threatened in letters dated the 28 January and 3 February 2004. These events are inconsistent with the implication of any agreement by CEL to extend the date for payment or of any representation by CEL or belief by CNIM that CEL did not intend to rely upon its strict legal rights. Accordingly I reject these submissions.

**CONCLUSION**

53. For the reasons given I consider that CEL are entitled to enforce the Decisions to which these proceedings relate. No doubt the appropriate order to reflect this judgment can be agreed. If it cannot, any outstanding issues can be resolved when or after the judgment has been handed down.