JUDGMENT : HIS HONOUR JUDGE GILLILAND QC. Salford District Registry. TCC : 10th November 2005

1. At the conclusion of submissions yesterday in relation to the claimant's application for summary judgment, I indicated that I considered that it would succeed and that I would give my reasons today. Accordingly, I now give my reasons in this matter.

2. Originally there were two applications for summary judgment before the court. The first was an application by the claimant for summary judgment issued on 11th October this year, seeking payment of a sum of £1,333,214.18 plus interest and costs. The other application was an application by the defendant for summary judgment issued on 25th October 2005 in respect of the defendant's counterclaim for a sum of £2,123,000 liquidated and ascertained damages. The defendant's application has been withdrawn with the permission of the court on the basis that it would not be reinstated. The counterclaim, I understand, may proceed to trial and directions may be required. There may be other means in contemplation by the defendant, as well – I do not know. This judgment is, accordingly, confined to the issues raised and argued in relation to the claimant's application.

3. As I say, the claimant's application seeks payment of a sum of over 1.3 million pounds with interest. That sum was a sum which was ordered by an adjudicator, Mr Hayes, to be paid. His decision was given on 6th October of this year. Mr Hayes, as well as ordering payment of the sums totalling 1.3 million pounds in respect of interim certificates 20 and 21, also made a declaration that seven notices purporting to be notices given by the defendant of non-completion pursuant to clause 24.1 of the building contract were invalid. That can be seen at paragraph 107 of his decision.

4. The dispute which was before the adjudicator was whether the defendant was entitled to deduct liquidated and ascertained damages following the issue of the seven notices. That appears from the notice of intention to refer the matter to adjudication, dated 19th August 2005, whereby under paragraph 2 the claimant gave notice pursuant to clause 39 of the contract of its intention to refer the following disputes to adjudication; namely, whether the responding party (that is the defendant) is entitled to deduct from monies otherwise due to McLean the following sum or sums: (a) liquidated and ascertained damages in respect of sections 1(a), 1(b), 2(a), 2(b), 3(a), 3(b), 4, 5(a), 5(b), 6 and 7 of the contract following the issue of purported non-completion certificates under clause 24.1 by the employers' agent. There was then an alternative claim: any sums exceeding the total of the liquidated and ascertained damages calculated by reference to the periods of delay and rates of liquidated and ascertained damages set out in Albany's withholding notice of 21st July 2005. Then there was a claim for payment of the monies which had effectively been withheld.

5. The decision of the adjudicator was that the withholding in respect of the two certificates as referred to (20 and 21) was invalid and improper, and what he did was order payment of the monies which had been deducted together with interest. Those sums amounted to the 1.3 million pounds I have referred to.

6. It is also the case that the defendant, in reliance on the seven notices which the adjudicator held to be invalid, also made deductions in respect of liquidated and ascertained damages from two later interim certificates; namely, 22 and 23. In the claim form and in the particulars of claim and (I think I was told) also in the draft order, which was attached to the present application for summary judgment, there was clearly a claim for payment not merely of the 1.3 million but also a claim for the payment of monies under certificates 22 and 23.

7. Mr Singer, on behalf of the defendant, at the outset of the hearing pointed out that the actual form of application for summary judgment did not ask for payment in respect of certificates 22 and 23. Having heard submissions from the parties, I gave permission for the application form to be amended to include payment of monies under these two later certificates. It was not suggested by Mr Singer that there was any injustice or difficulty arising in the matter, and the fact of the matter is that the validity or otherwise of those payments under the certificates had been dealt with in the evidence before the court by both sides. It was purely, it seemed to me, a technical defect, and it seemed to me the overriding objective clearly indicated that I should give permission to amend (and I did) and abridge time. I, therefore, dealt with the real dispute between the parties rather than requiring them to come

back again on another day to re-argue, perhaps, matters which should all have been dealt with at once.

8. Mr Singer has taken, it is right to say, five points in relation to the application. He submits that summary judgment should not be granted in the present case for the various reasons he referred to. The first point he took was set out in paragraph 6 of his very helpful skeleton argument, where he challenged effectively the contract under which the adjudicator had acted. In paragraph 6, it is said, *"It is clear, as identified in the draft amended defence, paragraph 2(a), that the adjudication proceeded on the basis of a contract which McLean now says is not the contract between the parties. Albany submits that this fundamentally affects the adjudicator's appointment so that his decision was made without jurisdiction"*. It seems to me that that submission is, in fact, unfounded when one looks at the facts and circumstances of this case.

9. There is no dispute between the parties that a JCT building contract was entered into between them in relation to the work in question. There is no dispute that that JCT contract contained provisions for adjudication. There has been no suggestion that the contractual procedures referred to in those conditions in that contract have not been complied with in relation to the appointment of Mr Hayes as adjudicator in relation to the dispute which Mr Hayes dealt with in relation to these seven notices under clause 24.1 of the contract.

10. What, in fact, has happened is that there is, in addition to the JCT building contract, a supplemental agreement in existence, apparently, between the parties. That document is dated the same day as the JCT contract. The defendant disputes that that supplemental agreement is part of the contract between the parties. The precise grounds on which that is disputed are not clear to me and have not been set out in any correspondence which I have seen. Anyway, the position is that apparently there is a dispute between the parties whether the supplemental agreement is part of the contractual relations between the parties.

11. The supplemental agreement, when one looks at it, clearly does contain provisions which seek, if the agreement is valid, to vary certain of the provisions of the contract but they do not seek to vary in any respect whatsoever any of the provisions of the JCT contract which were the subject of the adjudication.

12. What one has in this case, it seems to me, is simply this. If the claimant is right and there were two contractual documents executed on the same day then the totality of the relations are obviously governed by the two documents. If the defendant is right they are governed simply by the main JCT contract. The existence, however, of the supplemental agreement, it seems to me, cannot be regarded as in any way affecting the validity of the adjudicator's appointment or of his jurisdiction.

13. Mr Singer submitted (as I understood his submissions) that the effect of the supplemental agreement was to effectively extinguish the JCT contract and replace it with another contract. I think, as a matter of construction of the supplemental agreement, that is not a permissible view of the matter. It simply purports to be a document which varies it in a number of important respects and, in particular, in relation to price. Because if the defendant is right in its view of the interpretation of the document, it may have the effect of converting the JCT contract from effectively a fixed price contract into not quite a costs plus but a similar kind of contract; because there is a provision in the supplemental agreement which has the effect of saying, broadly speaking, that if the total outcome of cost is above or less than what has been referred to as the target price then any gain or loss is to be shared between the parties in certain proportions. But, as I say, whether that is a contractual term and binding between the parties seems to me to have absolutely nothing to do with the provisions of the main JCT contract which was undoubtedly in existence between the parties and which was the subject matter of the adjudication.

14. It is also noteworthy that the supplemental agreement expressly incorporates into the supplemental agreement the dispute resolution provisions in the main contract. So it has its own dispute resolution procedure; namely, by adjudication or otherwise as provided in the main contract. To suggest in those kinds of circumstances that the main contract somehow has gone seems to me not to be a realistic

view of the matter. Accordingly, I take the view that there is no substance in the point. It is also, it seems to me, fairly clear that the parties knew perfectly well that there were two documents, and it does seem to be that there has been a dispute between the parties for some time prior to the adjudication as to whether the second supplemental agreement was a binding agreement or not.

15. The second point which has been taken by Mr Singer again goes to the adjudicator's jurisdiction and, if valid, would deprive the adjudication of any binding effect. The point here is that there was, in fact, a previous adjudication between the parties, again conducted by the same adjudicator, Mr Hayes. That adjudication, again, was in connection with liquidated and ascertained damages under this contract. In this first adjudication the adjudicator effectively found in favour of the defendant; the point being whether there had been a valid withholding notice in relation to the deduction of liquidated and ascertained damages.

16. It is a question of construction of the notice of intention to refer the first dispute to adjudication and of the relevant conditions as to whether Mr Hayes had jurisdiction in relation to the second adjudication. The second adjudication contains an express provision dealing with previous issues or previous adjudications. The JCT contract was varied in a number of respects and one of the respects in which it was dealt with was a provision that the CIC Rules should apply to any adjudication. The relevant rule is to be found in, I think, paragraph 30 and it is in the following terms: *"No issue decided by the adjudicator may subsequently be referred for decision by another adjudicator unless the parties so agree".*

17. The question is whether the issue which was decided by Mr Hayes in the first adjudication was effectively the subject of the second adjudication. In order to answer that question, one has to look at the issues that were before the adjudicator in each case. Clearly in relation to the second adjudication the issue was whether the defendant was entitled to deduct liquidated and ascertained damages in reliance on clause 24.1 of the contract. I should say there is no dispute between the parties that a notice under clause 24.1 is a condition precedent to the levying or deduction of liquidated and ascertained damages.

18. What happened in relation to the dispute in relation to adjudication number one was that a deduction had been claimed to be made in respect of liquidated and ascertained damages and a withholding notice was given. The claimant challenged the validity of that withholding notice and the adjudicator upheld the validity of the notice. The notice of intention leading to the first adjudication is in the following terms: *"McLean hereby give notice pursuant to clause 39 of the contract of its intention to refer the following dispute to adjudication; namely, (1) whether the withholding notice purportedly served by the respondent party and dated 19th June 2004 is valid and of no effect; (2) whether the deduction of liquidated and ascertained damages by Albany from McLean's certificate for payment number 20 is thereby invalid; (3) repayment of the sum of £664,893 due to McLean under certificate number 20."*

    It will be recalled that certificate number 20 was one of the matters which was dealt with in the second adjudication and Mr Hayes ordered payment of that sum of £664,000 and that is part of the 1.33 million pounds. There was then a claim for interest.

19. The relevant condition under the contract between the parties provides that no issue decided by the adjudication may subsequently be referred for decision by another adjudicator unless the parties so agree. So the question is: what issue was decided by Mr Hayes in the first adjudication? Mr Hayes, it is right to say, did carefully consider this matter in the second adjudication. His decision, of course, as a matter of law is of no binding validity if he is wrong. So the question is: was he right? He took the view that the issue that he decided in the first adjudication was whether the withholding notice was valid, and effectively whether, as a result of that, the deduction of liquidated and ascertained damages was invalid. He held the notice was valid and that is what he did.

20. It seems to me that, although Mr Singer referred to the provisions (for example) of the scheme for construction contracts, that scheme contains different provisions. It does not talk in terms of issues decided by the adjudicator. It seems to me that, giving the word "issue" in the CIC condition its normal and ordinary meaning, it means the point which he actually decided – the point in dispute which he decided – and that there is a distinction between issue and claim. There was a claim in the

first adjudication for payment of the £664,000 but the actual issue which he decided was the narrow issue of whether, in fact, it could be deducted in reliance on the withholding notice, and he held that the withholding notice was effective but he did not go beyond that, it seems to me.

21. The position in relation to the failing to order any payment was simply the consequence of the validity of the withholding notice. If that notice was valid, then the deduction was not thereby invalid as stated in item 2 of the notice, The adjudicator found it was not thereby invalid. I do not think his decision went beyond that. It seems to me that that is a commonsense, practical, businesslike interpretation of paragraph 30 of the CIC rules. He looked to see the points he had actually decided in the dispute, what had been argued before him, and what he decided in relation to the arguments. That is what is referred to by "***issue* "** in rule 30. It seems to me, again, that he had jurisdiction to deal with a different issue in the second adjudication; namely, the issue of whether, in fact, there could be any valid deduction of liquidated damages at all having regard to the notices which were, in fact, given (or purported to be given) under clause 24.1. That is a different issue, it seems to me, and there is, therefore, no duplication and the CIC conditions did not deprive the adjudicator of any jurisdiction in relation to the second adjudication.

22. The third point which was raised by Mr Singer was a point of natural justice. It was submitted that the adjudicator had not dealt with an important part of the defendant's case. I was referred to the decision of the adjudicator in the second adjudication and, in particular, to paragraph 79 of his decision which is headed "***estoppel".*** What the adjudicator said in paragraph 79 is this:

"By way of a further argument in the alternative, Albany suggests at paragraph 39 of the response that the claimant, McLean, is estopped from denying the validity and/or effectiveness of the notices intended as notices of non-completion. The basis upon which it is contended that estoppel arises is not particularised or evidenced. McLean says that no case has been made out that suggests either estoppel or waiver on the part of McLean. I would concur with McLean in that regard. If there are any grounds that gave rise to such an estoppel or waiver, Albany has not provided details to make out its case."

23. Mr Singer drew my attention to the provisions of the rejoinder which do, in fact, give some particulars of the facts relied on in relation to an estoppel. But when one looks at the rejoinder and at paragraph 39, one sees they are, in fact, dealing with different subject matters. The subject which has been dealt with in paragraph 39 was an estoppel said to arise from the fact that McLean acquiesced in not challenging the validity of the first non-completion notice issued in October 2004 and the subsequent non-completion notices issued thereafter. It was submitted that McLean was thus estopped from denying the validity and/or effectiveness of all the non-completion notices and/or has waived its entitlement to do so as Albany would be clearly prejudiced by McLean's actions and/or inactions. It is in relation to that submission that the adjudicator was saying that no details had been provided; and that, I think, is correct. The point that was being made in paragraph 39 was effectively (to put it very briefly) that because McLean had not objected to the withholding notices under clause 24.1 when they were issued, they were now estopped from taking the point and the adjudicator was fully entitled to take the view that that claim had not been made out.

24. The claim in relation to the rejoinder was a claim in relation to a different alleged estoppel that had been in issue. That was in relation to the question of whether the relevant date for the completion of a section was a Friday or a Sunday. This was in connection with an argument as to time of service of a notice and whether it was served prematurely because it was served on the Friday or whether it should be regarded as being served at some other time. The view of the adjudicator was that that was not a point which he needed to decide; because the view he took of the matter was that it did not matter what time it was served after the Friday – if it was issued on the Friday, it was invalid. That was his view and, therefore, he did not have to go further into the matter. That, I think, is dealt with paragraphs 34 and 35 of his decision, where he says:

"Perhaps unsurprisingly, the issues, which at face value appear to be raised by this dispute, have resulted in not inextended argument about whether, on a proper construction of the contract or by reason of an estoppel by convention, the completion date for any given section is the Friday of the contract week stated in appendix to the conditions or the Sunday. In the event, I have concluded that in order to answer the principal question raised by

this dispute – namely, whether the notices intended as notice of non-completion are valid notices complying with clause 24.1 – it is not necessary to decide which of those days the completion date is. The reason I have reached that conclusion is this. If (as Albany contends) the completion date is the Friday of the applicable contract week rather than Sunday, McLean's case is that they had until midnight of the Friday to complete the construction of any given section. Subject to that argument advanced by Albany about the meaning of the word "issue", which I will consider later, there is no suggestion that notices were raised after midnight of the applicable Friday."

Therefore, the adjudicator had, in fact, dealt with the matter which had been raised in the rejoinder; and his decision, it seems to me, cannot be criticised in that respect and certainly not on the grounds that he ignored a significant point raised by the defendant. He simply said it was not necessary to decide it for the reason he gave. That seems to me to be the end of the matter.

25. The fourth point that was raised by Mr Singer was that of setoff. The basis of the claim to set off arises out of the fact that it is said that under clause 24.1 of the contract if a notice is given then that triggers the right of the defendant to claim liquidated and ascertained damages. There is no dispute, it seems to me, that the sectional dates provided for completion in this contract were exceeded, as we have seen in relation to all the sections in question, but there are disputes in relation to what is the correct date. These however are matters which appear to arise mainly in relation to the defendant's own summary judgment application. What, in fact, has happened is that, following the decision of Mr Hayes, fresh notices have been served purporting to be notices under clause 24.1, and so it is said there is a claim to liquidated and ascertained damages. That was the subject matter essentially of the defendant's application, though it is right to say the defendant also in its application sought to challenge the decision of Mr Hayes as to the validity of the original notices which had been served previously.

26. So far as the original notices are concerned, that application has been withdrawn and, therefore, the question so far as setoff is concerned is that there cannot be a setoff in relation to the original application in the sense of a setoff which entitles the defendant to immediate payment here and now of liquidated and ascertained damages. If its second set of notices are valid and there is no defence to it, what it has is the right to obtain liquidated and ascertained damages. So effectively the position is it is a claim by Albany to be entitled to liquidated and ascertained damages rather than a present and established obligation on McLean to pay the liquidated and ascertained damages here and now.

27. The claimant, I should say, has raised a number of points in relation to the second set of notices; some of which may be valid; some of which may be not be valid. I am not concerned to investigate that at this stage. All I can say is that it is disputed and it may be that it is correctly disputed, but I have not had full argument on the point and it would be wrong for me to say whether there was any substance in either the claim for the liquidated damages or the claim that they are not payable for the reasons which have been given. That is effectively a future question which will be decided on another occasion either by a court or in other proceedings.

28. So what one has, is an adjudicator's decision ordering payment of monies, that is the 1.33 million. I will return in a moment to the claim in relation to the other two items: the two later certificates 22 and 23. So far as the adjudicator's decision is concerned, one has simply an adjudicator's award which, in my judgment, was clearly given within his jurisdiction. He may have been right or he may have been wrong in relation the validity of the original section 24.1 notices but that is not a point which is for me to deal with today. That can be challenged in subsequent proceedings, if necessary. Having given the decision, the question then is: can the defendant refuse payment based on a cross-claim that it is going to be entitled to liquidated damages if it succeeds in the claim which it has put forward? In my view, the answer to this is no.

29. This was a point which came before this court over a year ago in a decision of my own, ***M J Gleeson plc v Devonshire Green Holdings Limited.*** In that case, counsel for the unsuccessful paying party was Mr Darling, who has appeared for the claimant in the present proceedings. I should say the decision was not appealed and Mr Darling now submits to me that my previous decision was perfectly right and that I ought to follow it in the present case. What I held in the previous decision was that when one looks at the clause in the agreement in relation to adjudication (clause 39.7), one finds provisions

which I took the view in the ***Gleeson*** case had the effect of excluding a claim to a setoff such as was raised in that case. That, again, was a claim for a setoff in relation to a future sum which might or might not become payable. I took the view that (to put it very briefly) it would inconsistent with the policy of the adjudication scheme to allow an adjudicator's award to be effectively rendered nugatory by simply raising a cross-claim which might or might not succeed at the end of the day. Of course, I will assume that the cross-claim is a genuine claim but until it is established it is not actually in law a legal setoff. It would operate as a defence in equity under the usual principles of ***Hanak v Green*** by way of equitable setoff. In the ordinary way, that is a defence and would normally (provided the cross-claim equalled or exceeded the amount of the claim) prevent summary judgment from being given and the matter would have to go to trial. I took the view that that reasoning and that principle did not apply where you had an adjudicator's award because the parties have agreed that they will comply with the adjudicator's award. That means that you cannot get out of the obligation to comply by raising a cross-claim and it seems to me that that is a sound principle which I should follow in the present case.

30. Mr Singer submitted, correctly, that there is no express provision in clause 39.7 saying ***"there shall be no setoff"*** but that does not meet the point, which, it seems to me, is that if parties agree to comply with the adjudicator's award they are saying they will do that, and that means they will not then refuse to do it on other grounds which may or may not turn out to be valid. That simply delays payment. The purpose of an adjudicator's decision ordering the payment of money is to assist cash flow. It is possible to challenge the matter subsequently if the parties wish to do so. That seems to me to be a clear policy and in my previous decision I did refer to the decision of the Court of Appeal in ***Levolux v Ferson***, which seemed to me to support that principle.

31. Mr Singer has drawn my attention to a decision of His Honour Judge Lloyd where the provisions were different and clause 39.7 did not apply to the adjudication there. In that case, His Honour Judge Lloyd saw no difficulty, I think it is fair to say, in permitting a cross-claim to defeat an adjudicator's award. I am bound to say, however, that that was part of a series of decisions which were considered by the Court of Appeal in ***Levolux*** and I take the view that the Court of Appeal did not accept the general principle in that line of authority, particularly that of ***KNS Industrial Services*** **and** ***David McLean*** and ***Bovis Lend Lease***, and preferred the view effectively of His Honour Judge Hicks in another decision; basically taking the view that I do that adjudicators' awards should not be frittered away by allowing cross-claims to be made. It seems to me that that is clearly supported by the language of the conditions in the present case. Accordingly, it seems to me that that ground is not a valid ground of defence against the adjudicator's award in respect of the 1.3 million pounds.

32. The position in relation to the other two certificates is slightly different. There has been no adjudication in relation to the sums payable under them. The claim is put forward by the claimant on the basis that this is effectively a certified sum ascertained in accordance with the provisions of the contract and, therefore, it becomes payable under the provisions of the contract unless and until either a valid withholding notice is given or there is some other reason which would enable the defendant to challenge the payment. In the present case, what is said by the defendant (as I understand it) is that the claimant must show effectively that there is no reasonable defence to payment under the two later certificates. The defendant has sought to levy liquidated and ascertained damages in relation to those sums. The answer of the claimant is that Mr Hayes, in the second adjudication, has, in fact, made a declaration that all the seven notices on which the claimant relies are invalid. That is binding, it is submitted on behalf of the claimant, on the defendant until it is set aside by agreement or by arbitration or by litigation as part of any other decision of an adjudicator. Accordingly, the defendant cannot now say that it is entitled to rely on the earlier notices of deduction under clause 24.1. It seems to me, in principle, that that must be right. That is what the adjudicator held. Any reliance on those by the defendant is reliance on an invalid notice; and, as it is a condition precedent to a deduction that there should be a valid notice, therefore, there cannot be any deduction.

33. In relation to the later notices the position is that, again, these are disputed. Are they disputed on substantial grounds, one might ask. The fact of the matter is that I have not been able to deal with that

because that application has, in fact, been withdrawn and I simply have the application in relation to the claimant's claim.

34. One of the points which was made by Mr Darling was that it has not been suggested that any withholding notice has ever been served in relation to deductions in respect of the sums in question. As far as I know, that has not been challenged. So, if there has not been a withholding notice before the monies became payable under the terms of the contract, they cannot be deducted. It seems to me that Mr Darling must be right on that point.

35. It seems to me, therefore, that the position is that the claimant is entitled to payment not merely of the 1.33 million pounds but also to the sums payable in respect of the two later certificates, which are otherwise unchallenged apart from the claim to deduct which seems to me to be invalid based as it is on invalid notices under clause 24.1. The later notices cannot be relied on as giving rise to a right to deduct from the 2 later certificates because there has been no withholding notice. That means that the claimant is entitled to summary judgment. I am not sure what the precise amount is. There is a claim for interest. Has that been agreed between the parties?

MR. SINGER: *Yes, it has, my Lord. Mr Woolley, who appears today in the absence of Mr Darling, has calculated a total sum, including interest, of £2,192,168.58.*

THE JUDGE: *Yes. Are you content with that sum? Is it correctly calculated?*

MR. SINGER: *Yes.*

THE JUDGE: *Thank you, Mr Singer.*

MR. SINGER: *We have checked the calculations outside because Mr Woolley was kind enough to check them with me and they do appear correct.*

MR. WOOLLEY: If they are not (inaudible).

THE JUDGE: *Good. So there will be judgment for the claimant in the sum of £2,192,168.58 and that is including interest to date, I take it?*

MR. SINGER: *Yes.*

THE JUDGE: *Yes. Thank you.*

(Further submissions followed re permission to appeal)

36. I propose to refuse permission to appeal. It seems to me that the question of the point in the ***Gleeson*** case really has been considered in principle by the Court of Appeal in the ***Levolux*** **case**. It has expressed views. It may be overturned but I think it is a matter for the Court of Appeal if it wishes to revisit that matter. In relation to the clause 30 point, I think it is a short, clear point of construction and, again, it is a matter for the Court of Appeal if it thinks it is wrong.

37. So far as payment is concerned, the usual provision is payment in 14 days under the general rules. There is power to abridge that time and that is quite frequently done in connection with adjudication awards because the intention is to assist cash flow. In the present case, I think the normal rule should apply (14 days). The reason I take that view in this case is that it is clear that the defendant wishes to consider the question of appeal and to make an application. I think it is only going to incur further costs if I were to make an order for immediate payment which would be appealed at once. That is not going to be in the interests of anyone, I think. If I allow 14 days, that gives time for consideration and if an appeal is subsequently pursued then it is a matter for the Court of Appeal to say whether there should be a further stay or not. Otherwise the money will be payable.

(Further submissions on costs followed)

Solicitor for the Claimant: MR. WOOLLEY
Counsel for the Defendant: MR. A. SINGER