

JUDGMENT : HIS HONOUR JUDGE HUMPHREY LLOYD QC: TCC 11th February 2005

- 1 This is an application by the claimant, Geris Handelsgesellschaft GmbH, for summary judgment in order to enforce the decision of an adjudicator, Mr D.H. Simper dated 14 January 2005. The amount claimed is £341,176 including interest and VAT. That comprises four sums. They appear on p.517C of the bundle. They are amended. I will refer to each by the principal sum, i.e. the amount exclusive of interest and VAT, i.e. £124,334, £109,166, £6,048 and £6,252.
- 2 The adjudication concerned the value of and circumstances in which work was carried out by Geris, which was a subcontractor to the defendant, CNIM, the main contractor for the design and construction of a waste incineration plant at Marchwood in Hampshire. The sub-contract was in the standard form of the Institution of Chemical Engineer 5, Model Form for Process Plant ("the Brown Book"). Geris' work was to design, supply and erect a geodesic dome to cover the plant.
- 3 For reasons which are recorded in the decision, the work did not proceed as originally intended. There was delay, for which in part CNIM was responsible and, in part Geris was responsible.
- 4 The contract manager issued certificates in accordance with the provisions of Clause 38. That says (as amended): **38. Payments**

38.1 *The Contractor shall pay the Subcontractor for the Subcontract Works and the total of the sums payable shall constitute the Subcontract Price. The sums payable shall be calculated in accordance with the provisions of Schedule E (Rates and prices), and paid in accordance with the provisions of this Clause 38 and Schedule F (Terms of payment). No payment shall become due to the Subcontractor under the Subcontract unless and until the Subcontractor has provided the bonds and guarantees to the Contractor in accordance with Sub-clause 3.14.*

38.2 *The Subcontract Price excludes Value Added Tax and to the extent that the tax is properly chargeable on the Subcontract Materials and the Subcontract Works, the Contractor shall pay such tax as an addition to payments otherwise due to the Subcontractor.*

38.3 *In the event that the Contractor fails to pay any amount certified as being due to the Subcontractor under the Contract by the relevant final date by which payment must be made to the Subcontractor under Sub-clause 38.7 without having given effective notice of his intention to withhold payment under Sub-clause 38.9, the Subcontractor may give the Contractor written notice of his intention to suspend the performance of the Subcontractor Works, stating the ground or grounds on which he intends to suspend performance. If such failure continues for seven days after the giving of such notice, then at any time thereafter and provided such failure is still continuing, the Subcontractor may suspend further performance of the Subcontract Works until payment is made.*

The provisions of Sub-clause 14.2 shall apply to such suspension as if it were the subject of a Suspension Order issued by the Project Manager.

Provided the Subcontractor submits a valid claim in accordance with Clause 18 (Subcontractor's claims), all additional Cost reasonably incurred by the Subcontractor as the result of such suspension and subsequent resumption of the Subcontract Works, shall form part of the Subcontract Price.

38.4 *[Deleted]*

38.5 *Within one month after the end of the Defects Liability Period, after the Contract Manager has issued the last Final Certificate for the Subcontract Works the Subcontractor shall submit to the Contract Manager a final application for payment setting out the amount which in the Subcontractor's opinion constitutes the Subcontract Price, such application being supported by such documentary evidence as the Contract Manager may reasonably require including a statement showing how the total has been calculated to enable him to verify the Subcontract Price.*

38.6 *Within fifty-six days of the date of receipt of the Subcontractor's final application for payment together with all necessary supporting documentation, the Contract Manager shall issue to the Subcontractor and the Contractor a final payment certificate stating the amount which, taking account of all previous payments, is in his opinion properly due to the Subcontractor. Such final payment certificate shall state the payment proposed to be made and the basis on which it has been calculated.*

38.7 *The Subcontractor shall submit an invoice to the Contractor for the amount certified by the Contract Manager under paragraph 3 of Schedule F (Terms of Payment for Lump Sum Contracts) or Sub-clause 38.6 together with any Value Added Tax payable thereon. The invoice shall state the Subcontract reference number stated in the Agreement or otherwise notified by the Contractor and both the contractor's and the Subcontractor's Value Added Tax registration numbers. The invoice shall be sent to the address of the Contractor stated in the Agreement or otherwise notified by the Contractor.*

Payment shall be due on receipt by the Contractor of a correct invoice. The Contractor shall pay the amount of the invoice by the final date for payment, being sixty days from receipt of the Contractor of the invoice.

- 38.8 *The Contract Manager's certificate issued paragraph 3 of Schedule F (Terms of Payment for Lump Sum Contracts) or Sub-clause 38.G shall constitute notice from the Contractor to the Subcontractor of the payment proposed to be made and the basis on which it has been calculated.*
- 38.9 *If the Contractor intends to withhold payment or make a deduction from any payment due under the Subcontract, including but not limited to any sums that may be due from the Subcontractor to the Contractor, the Contractor shall give notice to the Subcontractor not later than five days before the final date for payment as defined in Sub-clause 38.7, specifying the amount he proposes to withhold and the ground for withholding payment, or if there is more than one ground, each ground and the amount attributable to it.*
- 38.10 *If the Contractor fails to pay in accordance with this Clause 38, the amount unpaid shall bear interest, at a monthly rate of 2% over the Agreed Rate.*
- 38.11 [Deleted]
- 38.12 *Without prejudice to any other remedy which the Contractor may have, the Contractor shall be entitled to deduct from any payments due or becoming due to the Subcontractor under the Subcontract, any sums which are due from the Subcontractor to the Contractor under the Subcontract.*

Geris' claim is primarily about the certificates. The first (no 4) was issued on 27 April 2004. That was for £124,334. The second (no 5) was issued on 11 May 2004. That was for £109,166.

- 5 However, on 15 July 2004, before Geris had completed all its work - it appears that about 25 per cent of the work by value had not been completed - CNIM terminated the subcontract under the provisions of Clause 40 for failure to proceed regularly and diligently (and indeed possibly for other defaults). Clause 40 reads:

40. Termination for Subcontractor's default

- 40.1 *If the Subcontractor is declared bankrupt or goes into liquidation (other than a voluntary liquidation for the purposes of reconstruction or amalgamation) or has an administration order made against him or carries on his business or any part of it under an administrator or receiver or manager for the benefit of his creditors or any of them, then without prejudice to any other rights or remedies which the Contractor may possess the Contractor may forthwith terminate the employment of the Subcontractor under the Subcontract.*
- 40.2 *If the Subcontractor shall be in default in any one or more of the following respects:*
- (a) *without reasonable cause wholly suspends or abandons the carrying out of the Subcontract Works before completion thereof; or*
 - (b) *fails to proceed regularly and diligently with the Subcontract Works; or*
 - (c) *commits any other material breach of the Subcontract;*

then without prejudice to any other rights or remedies which the Contractor may possess, the Contract Manager may give the Subcontractor written notice specifying such default and if the Subcontractor shall fail to commence and diligently pursue the rectification of such default within a period of fourteen days after receipt of such notice, or shall at any time thereafter repeat such default, then the Contractor may forthwith terminate the employment of the Subcontractor under the Subcontract.

- 40.3 *In the event of the employment of the Subcontractor under the Subcontract being terminated under Sub-clauses 40.1 or 40.2 above, the following shall be included within the respective rights and duties of the parties:*
- (a) *the Contractor may himself or through others carry on and complete the Subcontract Works and he or they may enter upon the Site and use the Subcontractor's Equipment, Subcontract Materials and any other things whatsoever brought to the Site by the Subcontractor or which have become the property of the Purchaser pursuant to Sub-clause 26.1, and the Contractor shall not be liable to the Subcontractor for any fair wear or tear or accidental damage that may occur to such Subcontractor's Equipment, Subcontract Materials or other things;*
 - (b) *the Subcontractor shall, when so required by the Contractor, forthwith deliver to the Contractor all Confidential information together with all Documentation and technical information prepared by the Subcontractor as referred to in Clause 21 (Documentation);*
 - (c) *the Subcontractor shall assign to the Contractor all his rights under any sub-contracts.*
- 40.4 *All reasonable Cost incurred by the Contractor in the circumstances described in Subclause 40.3 (a) shall be recoverable from the Subcontractor as damages.*
- 40.5 *Termination of the employment of the Subcontractor under the Subcontract in accordance with this Clause 40 shall be without prejudice to the continuing rights and obligations of the parties hereto with regard to the provisions of Clause 20 (Confidentiality), Clause 44 (Disputes), Clause 45 (Reference to adjudication), Clause 46 (Reference to an*

Expert), and Clause 47 (Arbitration) and, to the extent that the Subcontractor has carried out the Subcontract Works, the provision of Clause 33 (Care of the Subcontract Works, liability for damage and injury), Clause 34 (Insurance) and Clause 36 (Liability for Defects).

- 6 On 12 November 2004 Geris gave notice of adjudication. The notice read, in part:
 "This is a notice of Geris's intention to refer these matters to adjudication pursuant to clause 45 of the subcontract. Geris' claims are summarised below:

A Payment for work carried out prior to the repudiation of the subcontract and an extension of time comprising of the following:

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|----|--|-------------|
| 1. | Payment of the following outstanding invoices: | |
| | (i) Invoice 131304 dated 27 February 2004; | £124,334.00 |
| | (ii) Invoice 13404 dated 29 March 2004 | £109,166.00 |
| 2. | Payment of the outstanding balance due under the payments referred to in schedule F of the Subcontract up to the repudiation of the Subcontract. | £154,540.17 |
| 3. | An extension of time for the completion of Phase 1 of the Subcontract works of 249 days from 7 November 2003 to 15 July 2004. | |
| 4. | Loss and expense arising from the delay to the Subcontract works and from the disruption caused to the Subcontract works. | £786,634.00 |
| 5. | The costs of Geris' remobilization in March 2004. | £14,658.95 |
| 6. | Payment for varied and additional work comprising: | |
| | (i) work arising from the redesign of the portholes | £6,048.00 |
| | (ii) work to build the platform for the Inset Deck erection | |
| | (iii) work to repair damage to the structure of the dome caused by others | £7,504.80 |
| | (iv) work to repair damage to the structure around the temporary entrance to the dome caused by others | £3,111.00 |
| | (v) work to create the 4 metre access zone around the perimeter of the dome. | £6,320.00 |

B Damages and loss arising from CNIM's repudiation of the subcontract comprising of the following:

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|-----|---|-------------|
| 7. | Loss of profit on the work to have been carried out under Phase 2 of the Subcontract up to completion. | £118,774.00 |
| 8. | The costs arising from the unlawful use by CLAIM and the loss by Geris, of Geris's equipment, comprising the following: | |
| | (i) the specially constructed dome walking platforms | £42,163.31 |
| | (ii) tools and equipment | £18,745.00 |
| 9. | The abortive costs of rental accommodation for Geris's employees. | £5,315.00 |
| 10. | The return of the personal belongings of Geris's employees that remained on site after CLAIM denied Geris access to the site following the repudiation. | |
| 11. | Reimbursement to Geris of the monies paid out by the Dresdner £316,730.00 bank to CLAIM under the Bank Guarantee no. 200 0002 73908. | |

Geris is seeking payment of all VAT and interest applicable to the sums referred to above."

The claims made in the notice of adjudication were set out in the adjudicator's decision in precisely the form in which they have been presented, as may be seen from para.11 of his decision, followed immediately in it by the further claims made by CLAIM in its response in the adjudication.

- 7 It is at this stage necessary to record the primary points taken by CNIM's case on this application. It says that whatever the adjudicator was asked to decide, he did not decide that any amount had now to be paid by CLAIM to Geris. He decided only amounts that might be payable subject to CNIM's rights of set-off which he upheld but which he was not able to and did not quantify. Geris do not accept that reading of the decision. Much of the argument has to be resolved by reference to the adjudicator's decision. The CNIM's case essentially depends upon the meaning to be given to the adjudicator's decision. In these circumstances, it is necessary to take account of the adjudicator's own account of the background to the dispute, which one finds at para.6 onwards, but materially to the matters to be decided, to which I have referred, which were summarised by the Adjudicator. It is clear that one can draw at least these conclusions. First, that both sides were seeking decisions from the

Adjudicator which would uphold their claims and which would give them money; secondly, that the Adjudicator would have to decide, in order to reach any such decision, whether or not the termination under the contract was lawful, not merely because of the counterclaims and other claims which CLAIM was to raise, but because of CNIM's attitude towards Geris' right to payment.

8. In this respect, it is relevant that Clause 40 of the subcontract in dealing with the question of termination says that if the employment of the subcontractor has been terminated then under Clause 40.4 all reasonable costs incurred by the contractor in the circumstances described in Clause 40.3(a) (i.e. the cost of completion) shall be recoverable from the subcontractor as damages. Thus the clause 18.12 of the contract is also relied on by CNIM. It says:

"Without prejudice to any other remedy which the Contractor may have, the Contractor shall be entitled to deduct from any payments due or becoming due to the Subcontractor under the Subcontract, any sums which are due from the Subcontractor to the Contractor under the Subcontract."

- 9 The adjudicator's decision proceeds in a clear and logical manner. He notes in para. 14 that the adjudication procedure did not require him to give reasons, and he had not been asked to give reasons, but he set down his thoughts in order to write a decision and he has therefore included some reasons with the decision in order to assist the parties when they attempt to resolve the remaining matters in dispute. That last statement is plainly looking forward to some of his decisions where he came to the conclusion that, for a number of reasons, he was not able to resolve some of the matters in dispute and therefore, very helpfully and commendably, he provided some guidance to the parties as to the way his mind was working when he reached conclusions on the matters that he did in fact decide.

- 10 The subcontract itself contains special provisions relating to the adjudication, which replaced those in the Model Form. They are to be found in the special conditions. They read:

"45.1 If a dispute or difference arises under or out of the Subcontract then either party may at any time give notice of his intention to refer such dispute or difference to adjudication under this Clause 45 and may within seven (7) days thereafter refer the same to the decision of an adjudicator (the "Adjudicator"). The notice shall specify:

45.1.1 the dispute or difference;

45.1.2 particulars of that party's reasons for being dissatisfied; and 45.1.3 the position the party believes is correct.

In this Clause 45, the party referring a dispute is called the "Referrer" and the party responding is called the "Respondent".

45.2 Where either party has given notice of his intention to refer a dispute to adjudication then:

45.2.1 any agreement by the parties on the appointment of the Adjudicator must be reached and the appointment made in sufficient time so that the dispute or difference can be referred to the Adjudicator within seven (7) days of the date of the notice of intention to refer;

45.2.2 if the parties are unable to agree on the appointment of the Adjudicator then application to the Chartered Institute of Arbitrators for the appointment of the Adjudicator must be made within the object of securing the appointment of and the referral of the dispute or difference to the Adjudicator within seven (7) days of the date of the intention to refer;

45.3 Upon the appointment of the Adjudicator the parties shall comply with all the directions which he may issue for the purpose of fairly and expeditiously considering the facts and issues in the dispute and so that the Adjudicator shall reach a decision within twenty eight (28) days of the date of referral to him under Sub-clause 45.1 or such longer period as is agreed by the parties after the dispute has been referred and the Adjudicator may extend the period of twenty-eight (28) days by up to fourteen (14) days with the Referrer's consent.

45.4 The Adjudicator shall:

45.4.1 act fairly and impartially;

45.4.2 disclose to the parties any interest he has in the dispute or difference;

45.4.3 take the initiative in ascertaining the facts and the law;

45.4.4 reach his decision in accordance with the applicable law in relation to the Subcontract;

45.4.5 not communicate with one party without the knowledge of the other;

45.4.6 publish his decision simultaneously to both parties;

45.4.7 if requested by one of the parties to the dispute, provide reasons for his decision

45.5 In determining any dispute referred to him for a decision the Adjudicator:

- 45.5.1 shall act as an Adjudicator and not as an Arbitrator;
- 45.5.2 shall consider any written representations, statement and expert's reports submitted to him by the parties (which shall be exchanged between the parties when the same are supplied to the Adjudicator);
- 45.5.3 shall afford the parties the opportunity to address him in a meeting or meetings at which both parties must be present;
- 45.5.4 shall permit the parties to be represented by such legal or other representatives, as they shall see fit;
- 45.5.6 shall have the power to require the parties to produce to him and to the other party copies of any documents they are able to produce which may assist in the reference (save any which would be privileged from production in Court proceedings) between the parties relating to the dispute; and
- 45.5.7 shall be entitled to instruct an expert and to take counsel's opinion as to any matter within their field of expertise raised by the reference, but shall not be entitled to delegate any decision to such expert or counsel.
- 45.6 The Adjudicator's decision is binding upon the parties until finally determined by legal proceedings or by agreement.
- 45.7 The parties hereby agree that the Adjudicator (including any employee or agent of the Adjudicator) appointed in accordance with this Clause 45 shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith.
- 45.8 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 45.6.
- 45.9 Subject to the provisions of Sub-clause 45.3, 45.4, 45.5 and 45.1 1, in deciding any dispute referred to him, the Adjudicator shall determine and take into account any matter ("Crossclaim") raised by the respondent to the notice to refer by way of defence or setoff or counter claim, provided such matter arises under this Agreement.
- 45.10 Sub-clauses 45.3 to 45.8 (inclusive) shall apply to any Cross-claim as they apply to any dispute referred to the Adjudicator pursuant to Sub-clause 45.1.
- 45.11 These Sub-clauses 45.8 to 45.10 shall not apply to any reference ("Current Reference") in respect of any Cross-claim if such Cross-claim is being decided or has been decided by an Adjudicator other than the Adjudicator by whom the Current Reference is to be decided.
- 45.12 Nothing in this Clause 45 is intended to preclude or prevent either party seeking or obtaining any interlocutory relief.
- 45.13 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.

Clauses 45.6, 45.8, 45.9, 45.12 and 45.13 are particularly important.

- 11 The parties are agreed that the subcontract meets the requirements of s.108 of the Housing Grants Construction and Regeneration Act 1996 Part II.
- 12 The adjudicator's decision has three sections, A, B and C. Section A is about "Payment for work carried out prior to the repudiation of the subcontract and an extension of time comprising the following...". Here Mr Simper considers the two invoices to which I have referred. He decides that both should have been paid. He says in para.A1.3:
"These sums were due and payable by CNIM well before the Subcontract was determined and therefore I do not find that CNIM can set off the monies from any subsequent payments without the agreement of Geris."
- 13 There then follow his reasons. At this stage it is not necessary to do anything more than mention them. They deal with the subject of the invoices and not with "the agreement of Geris", beyond a withholding notice given by CNIM which he thought was ineffective. Issue A2 concerned "Payment of the outstanding balance due under the payments referred to in Schedule F of the Subcontract up to the repudiation of the Subcontract.". Schedule E of the subcontract contained the rates and prices. Schedule F dealt with the terms of payment of the subcontract price. Both schedules are referred to in Clause 38.1 (see above). Schedule F is as follows: "**SCHEDULE F : TERMS OF PAYMENT**
INSTALMENTS
1. Payment of the Subcontract Price shall be made to the Subcontractor as per the following schedule, each payment being subject to strict compliance by the Subcontractor with the conditions of payment:

2. 10% of Subcontract Price on General Documentation Issuing, subject the Subcontractor having supplied to the Contractor each of the following:
 - Programme of works, with details of associated resources for completion of design, manufacture and site erection works, as required under Clause 13 of the General Conditions
 - Programme of submission of documents, as required under Clause 13.2 of Schedule B
 - Preliminary Inspection plan as required under Schedule H
 - Welding book as required under Schedule H
 - Preliminary Civil Works drawing relating positioning of loads and anchorages
 - Performance Guarantee and Parent Company Guarantee, as required under Clause 3.4 (as amended) of the General Conditions.
3. 10% of Subcontract Price shall be paid at the satisfactory completion of Design Phase and not before 4 months after the date of Commencement of the Subcontract, subject the Subcontractor having supplied to the Contractor each of the following:
 - Complete set of documentation as required by the Technical Specification No 4845 20 60/64 E001
 - Inspection Plan as required under Schedule H
 - Copy of the order placed to the steelworks manufacturer (without price and payment condition) for all steelworks required under the Subcontract.
4. 15% of Subcontract Price shall be paid at Mid Fabrication stage for the Steelworks Structure subject to the Subcontractor having supplied to the Contractor each of the following:
 - Evidence satisfactory to the Contract Manager of fabrication of 50% of the steelworks structures
 - Transfer of legal title of the related steelworks structures to the Contractor
 - Insurance Certificates for insurance to be effected by the Subcontractor as required under Clause 34 of the General Conditions and Schedule B.
5. 15% of Subcontract Price shall be paid on starting date for Site construction activities subject the Subcontractor having supplied to the Contractor each of the following:
 - Evidence satisfactory to the Contract Manager of fabrication of the remaining steelworks structures
 - Transfer of legal title of the related steelworks structures to the Contractor
 - Copy of order to the Cladding and envelope sub-contractors (without price and payment condition) for all cladding and envelope required for the Subcontract
 - Documentation required to start Site construction activities, including Site Erection Method Statement with cranes lifting scheme and Health and Safety Plan
 - Certificate issued by the Contract Manager or Site Representative attesting that Site construction activities have started.
6. 25% of Subcontract Price shall be paid monthly by reference to progress of Site construction activities for steelworks structures, in accordance with paragraph 7 below.
7. 25% of Subcontract Price shall be paid monthly by reference to progress of Site construction activities for Cladding, envelope and ancillaries (doors, louvers, etc ...), in accordance with paragraph 7 below.

MONTHLY PROGRESS PAYMENTS

8. The Contractor shall prepare an Evaluation Procedure after consultation with the Subcontractor and issue a copy to the Subcontractor not less than 28 days before the date of commencement of the Subcontract Works at Site. The Evaluation procedure shall be a procedure:
 - i) To determine a reasonable assessment of the extent of execution of Permanent Work Units;
 - ii) Without the need for monthly repeated detailed quality measurements; and
 - iii) Which is reasonably simple, quick and inexpensive to operate.
9. The Subcontractor shall following the end of each month make a reasonable assessment of the percentage amount of the Subcontracted Works performed up to the end of the month and submit this in writing to the Contract Manager with supporting details for his review and determination of the percentage amount and issue of a Progress Certificate.
10. The Contract Manager shall issue a Progress Certificate within 15 days after the receipt of each monthly assessment which states the following:
 - (a) The percentage amount of each Unit of the works performed up to the end of the month determined in accordance with the Evaluation Procedure;
 - (b) The amount payable for the Subcontract Works performed for each Unit of the works shall be determined by multiplying the Subcontract Price of the related Unit of the works by the percentage of the Subcontracted Works performed relating the Unit of the works as stated in the progress certificate;
 - (c) The amount payable for the month shall be the amount due for the cumulative Subcontracted Works performed up to the end of the month calculated as above less the aggregate amount already paid for such

Subcontract Works and less a deduction of 15% of the amount due by way of retention less those items (if any) about which the Contract Manager requires more information and less any other deduction or set-off made under the Subcontract.

RELEASE OF RETENTION (WARRANTY)

11. *The retention being withheld by the Contractor as set out in above paragraph 10(c) shall, upon provision of the necessary VAT invoice by the Subcontractor be released to the Subcontractor as follows:*

- (a) *One half (2.5% of Subcontract Price) upon issue of:*
- *The O & M instructions*
 - *The Constructor File*
- (b) *The remaining (5% of Subcontract Price) retention money upon expiry of the Defect Liability Period under the Subcontract, or if the Subcontractor has issued a retention bond for such amount in the form set out in Annex to the Special Conditions issued by a first class bank or insurance company approved by the Contractor in writing, together with release of the first 2.5% of the retention.*

GENERAL PROVISION

12. *The Contractor may withhold any payment which would otherwise be due if the Subcontractor fails to comply with the above-mentioned obligations or any of his other obligations under the Subcontract.*

If the Subcontractor fails to submit a VAT invoice in accordance with Clause 38.7 of the General Conditions for any payment within two years of the end of the month in question he shall cease to be entitled to such payment.

REQUEST FOR INFORMATION

13. *Any request for further information shall be stated on the Progress Certificate and when that information has been provided to the satisfaction of the Contract Manager he shall include any further sum in the next certificate.*

CORRECTING AND WITHHOLDING OF CERTIFICATES

14. *The Contract Manager shall have power to omit from any certificate the value of any work done goods or materials supplied or Subcontract Works rendered with which he may for the time being be dissatisfied for any contractual reason and for that purpose may by any certificate delete correct or modify any sum previously certified by him.*

COPY OF CERTIFICATE

15. *Every certificate issued by the Contract Manager pursuant to this Schedule shall be sent to the Contractor and at the same time copied to the Subcontractor with such detailed explanation as may be necessary.*

PAYMENT ADVICE

16. *Where a payment made in accordance with Sub-clause 38.7 of the Subcontract differs in any respect from the amount certified by the Contract Manager the Contractor shall notify the Subcontractor forthwith with full details showing how the amount being paid has been calculated."*

15 Mr Simper decided that the amount that might be due to Geris under the terms of the subcontract was £8,100 (and not £154,540.17 as claimed) . It is necessary to see his reasons both in themselves and how he arrives at them. Having referred to certain preliminary matters, he says in para.A2.3:

"I have found below that the termination of the Subcontract by CNIM was lawful and therefore CNIM is entitled prima facie to its additional costs (damages) for completing the Subcontract Works. Under such circumstances those costs must be set against the cost that CNIM would have incurred had Geris completed the Subcontract Works. That means the arguments regarding the amount of work undertaken by Geris at the date of termination and whether or not Geris had supplied copies of the orders for which CNIM deducted monies are irrelevant. The redress for any such failure is a part of CNIM's costs of completing the project."

16 I have no doubt that the Adjudicator is there referring to Clause 40.4. In considering what he means in the second sentence: *"..these costs must be set against the costs ..."* he is thinking, in my judgment, in terms of a mechanism such as that set out in Clause 38.12. Indeed, in the next paragraph of the decision (A2.4) he says: *"Thus the gross value of work against which CNIM is entitled to claim damages is as follows.. ."* [Emphasis supplied]

He sets out 75 per cent of the subcontract sum (£2,375,475) , the value of work under two heads to which I shall return a little later on (£6,048 and £6,252) so as to arrive at a total of £2,387,775. From that sum he proceeds (in para.A2.5) to deduct the sum actually paid by CNIM to Geris (£1,819,386) and the sums that he found should be paid under A1 above, that is to say the two invoices of early 2004. That therefore brings the total outstanding to £334,889. He then records that he has found that that CNIM is entitled to liquidated damages for delay (and that is different from the additional cost of completing the subcontract works). So at that point he is clearly regarding the claim for damages for delay as

something to which the CNIM is entitled under Clause 38. In addition, CNIM has a counterclaim for back charges. CNIM's certificate No.6 had set out the back charges. He reconsiders the amount claimed and reduces it provisionally to £168,423.27 "until CNIM provide more detailed information".

17. He thus comes to the conclusion that that, from the subtotal previously stated (the amount outstanding at termination), namely £334,889, there are to be deducted: liquidated damages of £158,365 and the back charges of (£168,423.27), to arrive at the total due to Geris of £8,100.73.
18. Issue A3 was concerned with an extension of time. I do not need to deal with that. I do not also need to deal with Issue A4 other than to note the fact that Geris's claim for loss and expense arising from delay to the subcontract works and for disruption caused to the subcontract works was not dealt with by Mr Simper because he considered that he did not have jurisdiction to do so since the claim arose too late to be dealt with fairly. Put another way, it seems that he took the view that no crystallised dispute had arisen at the date of the notice of reference which would have justified him treating the claim as a matter within his jurisdiction. Whether that is correct or incorrect is immaterial; he did not reach a decision in relation to that claim.
19. Similarly, he did not decide other claims either of Geris and of CNIM. I will deal quickly with the two small additional items as it is now logical to do so. First, for work arising from the redesign of the portholes, the adjudicator awarded or valued a sum of £6,048. The second item is an item where CNIM may have disputed liability but the total arrived at was some £6,250 (as amended) for repair damage by others to the structure of the dome.
20. In my view, reading the decision as a whole, by this stage of his analysis of the claims, the disputes are being valued as part of the value of the work done by Geris at the date of termination. Accordingly, in my judgment, they are subsumed in his decision as to the £8,100.
21. I deal separately and later with the question as to whether the conclusions about all these amounts give Geris a right to be paid them, but I do not read Mr. Simper's careful decision as saying that there is an entitlement beyond that to which he had provisionally arrived at of £8,100.
22. Section B of the decision is concerned with the question of termination. As foreshadowed in Section A, Mr Simper found that CNIM's termination of the subcontract was lawful. That then led him to decide the consequences. Obviously Geris's claim for loss of profit was rejected as were other claims of Geris consequent on termination.
23. I now come to Section C where he considered some of the counterclaims of CNIM, such as those for liquidated damages and the back charges to which I have referred. . He was unable to reach a firm conclusion on some. He declined to consider the costs of completion claimed by CNIM at £2,112,075 for want of jurisdiction. So too did he decline to consider CNIM's claim for lack of productivity which amounted, it was said, to some £659,834.56. So too other claims, e.g. lack of productivity (£399,932.13); prolongation etc (£365,299), loss of overheads (£959,821.64). But I have to say that all of these claims are ones which, although declined on the grounds of jurisdiction, are ones which, on the face of it, may well be claims to which a party in the position of CNIM might have some entitlement even if not as much as is currently sought.
24. Issue C9 was as follows: *"That CNIM is entitled to exercise its right to set off in relation inter alia to the outstanding invoices and account balance."* Under clause 45.9 the adjudicator was bound to *"determine and take into account any matter ("Cross-claim") raised by the respondent to the notice to refer by way of defence or set-off or counter claim, provided such matter arises under this Agreement"*. His decision was: *"I find that CNIM is entitled to exercise its rights of set off."* Mr Simper's reason was: *"CNIM's rights of set off are protected under Clause 38.12 of the subcontract."*
25. As I understand it, this is the principal reason for the resistance by CNIM to Geris's application for enforcement. It gives rise to the question to which I referred earlier: What did this adjudicator decide? It is material at this point to continue to the end of his decision and to note that, although the Adjudicator (not surprisingly) made certain specific decisions in relation to payment of his fees, he did not summarise, beyond the summaries to which I have already referred, the upshot of his consideration of the claims and counterclaims of the parties. Significantly he did not express them as a

sum of money owing by one party to the other. Mr. Baatz QC for CNIM relies upon this as indicating that all the adjudicator was doing was something which the parties themselves might not have contemplated but which, in the light of his decision about not being able to deal with certain claims, principally through lack of jurisdiction, was necessarily inevitable, as he was not able to resolve all the disputes that had been presented to him. Therefore it was submitted on behalf of CNIM that the decision should be read as the adjudicator's best decisions as to the constituent elements of the amounts of the claims and disputes which he could resolve, leaving the parties ultimately to resolve the outstanding ones themselves or to start another adjudication. One would then be able to see how the balance of the account might be struck in favour of Geris or CNIM.

26. Ms. Dumaresq, in a careful argument on behalf of Geris, says that that is not the interpretation to be given to the decisions. She says that each section of the decision should be considered on its own. Section A in relation to the two principal and large amounts is a clear decision of entitlement that has arisen prior to the termination, and that Geris is entitled to payment of those amounts. Mr. Baatz essentially says that that is not the correct construction and that CNIM has its countervailing right in Clause 38.12. In addition once there had been a termination which might be considered to be a situation equivalent to that pertaining on a repudiation, on both a proper construction of the subcontract and of the decision, there should be no payment pending the evaluation of CNIM's set offs and counterclaims. The adjudicator had in part acknowledged them as sustainable in the passages to which I have referred, and were themselves based upon Clause 38.12.
27. By way of elaboration as to why that was the correct construction, I have been referred to the subcontract and, for example, to whether the rights in Clause 38.12 could supplant the rights available to the subcontractor, provided by the earlier parts of Clause 38. I was also invited to reconsider my decision in **FW Cook Ltd v Shimizu (UK) Ltd** [2000] BLR 199 in the light of **Ferson Contractors v Levolux** [2003] BLR 118. I was also referred to **Rupert Morgan Building Services v David & Harriet Jervis** [2004] BLR 18. It was submitted that Clause 38.9 gives effect to section 108 of the Housing Grants etc Act 1996 by providing that the contractor is not allowed to deduct any amount from any payment due under the subcontract without first giving notice not later than five days before the final date for payment. Given that the terms of the subcontract in the evaluation of variation and claims by the contractor lead to matters which require to be included in the subcontract price (see the provisions of Clauses 16-19) and the subcontract prices itself dealt with in Schedule F and Clause 38.1 begins with the reference to Schedule F and continues with setting out the mechanism by which the subcontract price is to be paid, namely the installments referred to in Schedule F are to be implemented under the procedures of Clause 38, it is said that the adjudicator could not have been intending to deprive the claimant of its pre-existing and accrued rights prior to termination, since it is for present purposes assumed that the contractor had not complied with Clause 38.9 in a way which would enable him to resist payment.
28. In my view, the answer turns on the Adjudicator's decision. Although on applications to enforce adjudicators' decisions a practical approach is adopted in this court, it is important to bear in mind that when a defendant resists enforcement it has to do so on the basis that it has reasonable prospects in sustaining its defence, namely their defence is not fanciful, as it is said. This court, in considering defences which are solely questions of the construction of the contract, is often in a position, having heard argument on what is in many cases "a matter of first impression" to declare, in effect, that they are fanciful and so to resolve them in favour of claimants. That only occurs if they can easily be resolved consistent with the overriding objectives set out in the Civil Procedure Rules that it is not only just to do so but also that it ought to be done in order to avoid further time and expense. If they cannot easily be resolved then the defendant will have demonstrated that it has not got fanciful, but realistic, prospects of success.
29. Where, on the other hand, a question arises as to the construction of an Adjudicator's decision, the same approach must apply, that is to say, the claim will succeed if the construction advanced by the defendant can properly be described as in the nature of being fanciful, namely it is not likely to

succeed, and therefore there are no realistic prospects of success. Unlike a decision on the law, it may be rather easier to arrive at that conclusion since there are limits on the extent of argument about a decision.

30. In my view, the adjudicator's decision, read in its entirety and in the context in which it was said, admits, in my judgment, of only one view, and that is that in arriving at his conclusion in Issue C9 Mr Simper decided CNIM had an immediate right to set off the amounts that it is claiming against any amount that would otherwise have been due to Geris under the earlier provisions of the decision or otherwise. I reach that conclusion merely by the very clear words in the answer to Issue C9, but also, as I have pointed out, first, by the absence of any conclusion as to what amount was now payable by CNIM to Geris, which one would have expected to see from a careful and measured decision if Mr Simper had thought that Geris was now entitled to certain sums of money notwithstanding CNIM's prospective right of set off, and secondly, because of the words of Section A2.3 and A2.4 where the Mr Simper was plainly looking forward to what the effect of his decision would be, namely, that the termination of the subcontract was lawful. He there says that CNIM is prima facie entitled to its additional damages (costs) for completing the subcontract works: *"Under such circumstances those costs must be set against the costs that CNIM would have incurred had Geris completed the subcontract works."* Therefore he arrives at the gross value of the work against which CNIM is entitled to claim damages. Obviously in coming to any net figure, he has to take out of account, as part of his calculation, the amounts in relation to the invoices, but Mr Simper's purpose is quite clear, that is to demonstrate the overall effect of the conclusion that he ultimately reached namely that in truth there is nothing presently due to Geris.
31. That, in my judgment, is the apparent upshot of the adjudicator's decision. In the light of the arguments presented to me for Geris, is it nonetheless a conclusion that I should reach? Is it a tenable reading? I think it is. I do not find it easy to resolve the question as to whether or not the provisions of clause 38.12, read in the context of the earlier provisions of Clause 38 so as to afford CNIM a right of set off beyond the limited rights set out in Clause 38.9, for example. There are a number of competing and countervailing approaches including powerful arguments in favour of Geris that the whole of clause 38 is designed to regulate the amounts of the payment, that there is nothing in Clause 38 to indicate that it does not continue after termination when a subcontract price has to be arrived at notwithstanding the work may not have been completed, the provisions of Schedules E and F are not temporarily linked to the continuation of the work, and accordingly, unless CNIM has complied with the requirements of Clause 38.9, which for present purposes it is to be assumed that it had not, they are not entitled to raise the set offs and counterclaims on which the Adjudicator has so far not been able to reach a decision.
32. On the other hand there are arguments which are at least powerful to the contrary. Mr. Baatz says: No, such a conclusion would not be sensible. Clause 38 deals with the ordinary situation when things are going, as it were, all right or at least not terribly badly. Once there has been a termination then the situation is equivalent to repudiation, not least because, amongst other things, not only Clause 38.12 but also Clause 40 itself refer on a number of occasions to the contractor's other rights and remedies. Therefore, as I understood Mr. Baatz's argument, there is to be some consonance between what would happen if a contractor elected to treat a subcontract as repudiated, and the provisions in the subcontract where there has been a formal termination for the subcontractor's default under the provisions of Clause 40. It may not be immaterial to note that that terminology was, at least at one stage, used by the adjudicator in his decision. So it is said that it would not make sense in those circumstances, where the work is now being finished by the main contractor, for the contractor then to have to evaluate that work, and then to include it in the subcontract price and at the same time give notices to protect its position and to claw back the value of the work done by it. I see considerable force in that submission. One of the reasons why the issue is essentially difficult to resolve is that Clause 40 in this Model Form is not as full as other Model Forms. Strangely, since the situation is as common as many others which are the subject of provisions in this Model Form, it and says nothing about whether payments should or should not be made.

33. Ms. Dumaresq placed considerable reliance on the decision in **Ferson v. Levolux**. That decision is not of direct relevance to the point which I have to decide, which is solely concerned with the construction of the Adjudicator's decision. But in deference to her citation of it, and if there is a question about the tenability of Mr Simper's decision or my reading of it, then, in considering all three judgments in order to determine the ratio decidendi, the point there at issue turned upon the relevant clause in the contract, to which Longmore L.J. referred to expressly. Clause 38A.9 said:
- "..... The contractor and subcontractor shall comply forthwith with any decision of the adjudicator and shall submit to summary judgment/decree and enforcement in respect of all such decisions."*
34. Longmore L.J. thought that the answer was primarily one of construction of the subcontract in question. That was also the view taken by Mantell L.J., who gave the leading judgment. He said that certain clauses 29.8 and 29.9 - had to be read as not applying to monies due by reason of the Adjudicator's decision. His reasoning is not elaborated beyond that which I have referred to in the judgment of Longmore L.J., which whom Ward L.J. agreed. Thus if the ratio of **Furson**, is that Clause 38A.9 of that subcontract was decisive of the rights and obligations of the parties.
35. For that reason, Ms. Dumaresq understandably placed weight upon the provision in the special conditions of Clause 45, which she maintained were comparable, such as clause 45.6, but notably, Clause 45.8
- "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 45.6."*
36. In one sense, that clause states the obvious. Therefore it perhaps doing rather more is in fact asserting a right to be paid notwithstanding, as it were, the arguments currently being advanced by CNIM. I have already pointed out the difficulties in interpreting the relationship of the termination provisions in Clause 40 with those of the payment provisions in Clause 48. Clause 45.8 is certainly capable of being given the meaning given to it by Ms. Dumaresq, but in my judgment it is equally capable of being read as simply a declaratory provision that you are not prevented from going to the courts by reason of the fact that the dispute or difference may ultimately have to be decided under clause 45.6. It is certainly a condition appropriate to a contract which is not subject to the Act (although this contract was), because otherwise it is redundant as a statement of the obvious. I do not consider that the language of Clause 45.8 is to be treated as directly equivalent to the provision considered in **Furson** or expressing the same intention. Clause 45.6 in stating that the Adjudicator's decision is binding upon the parties, is in my judgment decisive. The decision is binding and therefore we again come back to where I started, and that is this adjudicator's decision. For the reasons that I have given, I consider that CNIM has realistic prospects of success in maintaining that the decision should not be read as giving rise to an immediate right to payment of the amounts for which the claimant seeks payment.
37. There was some argument about whether there might in all the circumstances be a right to an equitable set off. If it were necessary for me to reach a decision, I would prefer the arguments of Ms. Dumaresq, namely that in the context of an adjudicator's decision, having regard to the policy of Parliament, and as the discretion to allow an equitable set off should only be exercised, as Ms. Dumaresq submitted, in the rarest and most exceptional circumstances. Ordinarily - and I do not say any more - to allow a defendant to rely upon an equitable set off to postpone or to defeat enforcement of an adjudicator's decision would be counter to the public policy as set out by the Act. I would not therefore exercise such discretion in favour of CNIM.
38. Nevertheless, for the reasons I have already given, Geris' application must be dismissed.

Miss Delia Dumaresq QC (instructed by S.J.Berwin) appeared on behalf of the claimant.

Mr Nicholas Baatz Q.C. (instructed by Clifford Chance LLP) appeared on behalf of the defendant.