JUDGMENT : HIS HONOUR JUDGE RICHARD SEYMOUR Q. C. TCC : 19 March 2003

1. **Introduction :** The Claimant, R. Durtnell & Sons Ltd. *("Durtnell'),* is a very long established construction company based at Brasted in Kent. It specialises in the restoration and rebuilding of older properties principally in London and the South-East of England.

2. The Defendant, Kaduna Ltd *("Kaduna')* is a company incorporated in the Isle of Man, but controlled from the Principality of Monaco. Its operations seem to be conducted ultimately for the benefit of the well-known racing driver Mr. Jody Scheckter.

3. It appears that Kaduna is the freehold owner of the property known as and situate at Laverstoke House, Laverstoke Park, Whitchurch, Hampshire *("the Property').*

4. By an agreement *("the Contract')* in writing dated 18 May 1999 and made between Kaduna and Durtnell Durtnell agreed to undertake various works *("the Works')* at the Property for the sum of £5,890,244.55, or such other sum as should become payable pursuant to the provisions of the Contract. The Date for Completion specified in the Contract was 11 July 2000.

5. The Contract was in the Standard Form of Building Contract, 1980 Edition, Private With Quantities, issued by the Joint Contracts Tribunal for the Standard Form of Building Contract, incorporating amendments 1:1984, 2:1986, 4:1987, 5:1988, 6:1988, 7:1988, 8:1989, 9:1990, 10:1991, 11:1992, 12:1993, 13:1994, 15:1995, 16:1996 and 18:1998. In this judgment I shall refer to that form of contract as *"the Standard Form "*.

6. By clause 41 A of the Contract it was provided, so far as is presently material, as follows:

   "41A. I Clause 41A applies where, pursuant to Article S, either Party refers any dispute or difference arising under this Contract to adjudication...

   41A.4.1 When pursuant to Article S a Party requires a dispute or difference to be referred to adjudication then that Party shall give notice to the other Party of his intention to refer the dispute or difference, briefly identified in the notice, to adjudication. Within 7 days from the date of such notice or the execution of the JCT Adjudication Agreement by the Adjudicator if later, the Party giving the notice of intention shall refer the dispute or difference to the Adjudicator for his decision ("the referral"); *and shall include with that referral particulars of the dispute or difference together with a summary of the contentions on which he relies, a statement of the relief or remedy which is sought and any material he wishes the Adjudicator to consider. The referral and its accompanying documentation shall be copied simultaneously to the other Party...*

   41A. 7.1 The decision of the Adjudicator shall be binding on the Parties until the dispute or difference is finally determined by arbitration or legal proceedings or by an agreement in writing between the Parties made after the decision of the Adjudicator has been given.

   41A. 7.2 The Parties shall, without prejudice to their other rights under the Contract, comply with the decisions of the Adjudicator; and the Employer and the Contractor shall ensure that the decisions of the Adjudicator are given effect.

   41A.7.3 If either Party does not comply with the decision of the Adjudicator the other Party shall be entitled to take legal proceedings to secure such compliance pending any final determination of the referred dispute or difference pursuant to clause 41A. 71... "

7. The duration of the Works was considerably extended, in part, at least, as a result of variations, which increased the Contract Sum to a figure in excess of £11,000,000. By November 2002 a revised Completion Date of 22 February 2002 had been fixed. By that time the company performing the role of the architect named for the purposes of the Contract *("the Architect')* was Format Milton Architects Ltd. ("FMA").

8. By November 2002 various disputes are said to have arisen between Durtnell and Kaduna, to the detail of some of which it will be necessary to return.

9. By a Notice of Adjudication ("the Notice") dated 14 November 2002 and given on behalf of Durtnell by Messrs. Knowles Legal Services, Durtnell sought to refer some disputes between it and Kaduna to adjudication pursuant to the provisions of clause 41 A of the Contract.

10. Section 2 of the Notice was entitled *"The nature of the dispute"*. The terms of paragraph 2.1 of that section were these: *"This Notice concerns a dispute between the Referring Party, R Durtnell and Sons Limited* ("Durtnell"), *the contractor, and Kaduna Limited* ("Kaduna") *the employer under the Contract, for the alteration and refurbishment of Laverstoke House, together with the addition of an attached Orangery with enclosed walkway link to an indoor tennis/squash court and refurbishment of the existing stable block resurfacing and planting works and isolated works about the estate at Laverstoke Park, Whitchurch, Hampshire. "*

11. Despite its heading Section 2 of the Notice in fact gave no information as to the nature of the disputes which it was sought to refer to adjudication. For that information one had to turn to section 3, which was entitled *"The issues in dispute and redress sought".*

12. So far as is presently material, section 3 of the Notice was in these terms:

"3.1 Practical Completion

Whether the Works have achieved Practical Completion, if so, when was Practical Completion achieved, if not, identification of the reasons why.

Durtnell request a declaration as to the above.

3.2 Breach of Contract

Durtnell contends that Kaduna is in breach of contract for the following reasons:
(a) Breach of Contract with respect to certifying Practical Completion.
(b) Breach of Contract by interference with the function of the Architect and other consultants.
(c) Breach of Contract by interference with Durtnell 's Subcontractors without either the knowledge or consent of Durtnell.
(d) Breach of Contract by failing to comply with Article 3 of the Contract.
(e) Breach of Contract by failing to pass on information from the first Architect to the replacement Architect.
(f) Breach of Contract by installation of the future occupier's fittings by others.

Remedies sought for breach of Contract with respect to certifying in Practical Completion

Durtnell requests a declaration that:
(a) That Durtnell are required to complete the Works not by the Completion Date, but within a reasonable time;
(b) That Durtnell did complete the Works within a reasonable time;
(c) That Kaduna is not entitled to deduct liquidated damages, any such deduction is to be refunded, with interest;
(d) That Durtnell is entitled to be paid on a quantum meruit basis for work carried out after the Works were Practically Complete;
(e) That Durtnell are entitled to the refund of retention monies and interest as calculated in the "Interim Account" section of this Referral, or such other sums as the Adjudicator shall decide.

Alternative argument to breach of Contract under paragrraph 3.2 above

(f) If the Adjudicator decides that Practical Completion has not occurred, Durtnell contend that they are entitled to a further extension of time from the current Completion Date of 22 February 2002 until now, or such other date as the Adjudicator shall decide.

Durtnell request a declaration as to the above.

3.3 Additional Works
(a) Durtnell contends that they have carried out the following works, which are variations to the Contract: making good movement in timber, Re-preparation and redecoration of the internal works, and the dismantling, redecoration and reassembly of window hinges and shutters.
(b) Durtnell seeks a declaration that the above items are Relevant Events and matters under clause 25 and 26 respectively and that they are to be valued as per clause 13.5.4 of the Contract, or by whatever means the Adjudicator shall decide.

3.4 Interim Account

(a) Durtnell contends that their interim application No. 40 dated 19 September 2002 was not properly valued, and requests that it is done so.

(b) Durtnell contends that their loss and expense claims, covering the following periods, have not been properly valued, and requests that it is done so.
(1) The period 12 July 2000 to 3 May 2001; and,
(2) The period 4 May 2001 to 15 November 2001; and,
(3) The period 16 November 2001 to 14 December 2001; and,
(4) The period 15 December 2001 to 22 February 2002 (the present Completion Date); and,
(5) The period 22 February 2002 to 6 September 2002.

(c) In connection with application 40, and the loss and expense claimed therein, Durtnell contends that it is entitled to and due the sum of £2, 797,631 plus additional interest thereon or such other sums as the Adjudicator shall decide.

3.5 Liquidated Damages

(a) The Employer has deducted liquidated damages on two occasions, however the Employer failed to issue a valid notice of such deductions within the time specified in the Contract.

(b) Durtnell request that the liquidated damages deducted by the Employer are refunded with interest thereon or such other sum as the Adjudicator shall decide."

13. Durtnell's interim application No. 40 was in the total sum of £2,797,631. One of the elements making up that total was an amount of £412,524 in respect of what were called *"Sub-Contractors' Claims "*. That was in fact but a claim from one sub-contractor, A & A Co-ordinated Services Ltd. ("A&A') , in respect of alleged delay to mechanical and electrical works for a period of 74 weeks up to 14 December 2001. The claim was set out in A&A's valuation numbered 38 which was sent to Durtnell under cover of a letter dated 19 September 2002 which was in the following terms:

"Please find enclosed our valuation 38 for the above project.
This includes our prolongation claim up until 14th December 2001.
We will be pursuing a prolongation claim beyond this period up until our completion on site. In addition to the prolongation claim we are also compiling a disruption claim that will be in excess of £1,000,000. 00."

14. The person appointed as adjudicator to determine the matters raised in the Notice was Mr. Michael Wilkey. Mr. Wilkey produced a "Corrected Decision " ("the Decision ") dated 24 December 2002.

15. In the Decision Mr. Wilkey set out in section 4 what he indicated was "MY DECISION'. For present purposes the material parts of it were:

" 4.11 decide that the sum due to the Referring Party in respect of the matters referred to me is £1,228,313.50 + VAT at the applicable rate.

4.2 I decide that the sum of £1,228,313.50 + VAT shall be paid by Kaduna Ltd. to R. Durtnell & Sons Ltd, forthwith. "

The remainder of section 4 of the Decision was concerned with costs.

16. Section 3 of the Decision was entitled *"THE ISSUES AND MY FINDINGS"*. That section included:

"3.12 I find that, as a result of instructions issued to the contractor, that the contract period is extended to the 24 October 2002. I find that in considering the events pertaining to this contract the time taken to execute the varied works is reasonable....

Interim Account - Prolongation

3.49 I find that as a result of the instructions issued by the architects that the contract has been delayed by a further 45 weeks from the 15 December 2001 to 24 October 2002.

3.50 1 consider that a global claim is, or could be agreed to be, an acceptable basis of a claim such as is being considered in this matter, However, for the purposes of this adjudication I am unable to consider this claim in such detail as would need to be undertaken in seeking a final agreement and I therefore find that I am only able to make a decision on the basis of an interim account.

3.51 I am persuaded by the expert evidence of Mr. Davidson in respect of the claims under 'prolongation " and the award of loss and expense. I find that the Employer's quantity surveyor has awarded a sum of £839,423.00 for the prolongation in respect of the extended contract for a period of 74 weeks (to 14 December 2001), which I consider to be a reasonable sum.

3.52 I find that in respect of the period of 45 weeks for which I consider Durtnall [sic] has a reasonable claim for prolongation, that the sum for this loss and expense, on the basis of an interim account is £510, 435. 00.

Interim Account - Variations

3.53 Movement in timber - I find that the contract rates, as a result of the nature of the works as to scope, quantity and quality, cannot be applied and that therefore dayworks is a reasonable basis of the calculation of the costs of the works. I find that, on the basis of an interim account, a reasonable cost for these works is £100, 869.62, which represents 70% of that claimed.

3.54 Additional coats of paint - I find that this work can be valued on the basis of a fair rate for the work. I find that, on the basis of an interim account, a reasonable cost for these works is £88, 280.49, which represents 70% of that claimed.

3.55 Hinges - I find that the contract rates, as a result of the nature of the works as to scope, quantity and quality, cannot be applied and that therefore dayworks is a reasonable basis of the calculation of the costs of the works. I find that, on the basis of an interim account, a reasonable cost for these works is £52, 898.32...

Interim Account - Sub-Contractors

3.57 I find that as a result of the instructions issued by the architects that the M&E sub-contract has been delayed and disrupted by a further 45 weeks from the 15 December 2001 to 24 October 2002.

3.58 I find that the Employer's quantity surveyor has awarded a sum of £240, 625 for prolongation in respect of the extended contract for a period of 74 weeks (to 14 December 2001), (£3,251.69 per week), which I consider to be a reasonable sum.

3.59 I find that in respect of the period of 45 weeks for which I consider Durtnall [sic] has a reasonable claim for prolongation, that the sum for this loss and expense (£3,251.69 per week), on the basis of an interim account, is £146,326 05....

Interim Account - Liquidated and Ascertained Damages

3.62 1 find that as a result of the instructions issued by the architects that the contract has been delayed by a further 35 weeks from the 22 February 2002 to 24 October 2002 and that therefore liquidated and ascertained damages beyond this date cannot be withheld under the terms of the contract.

3.63 I therefore Decide that the sum of £92, 569.26 be paid to Durtnall [sic] as the sums authorised in interim certificates numbered 39 & 40. "

17. Kaduna did not pay the entirety of the sum determined by Mr. Wilkey in the Decision as due to Durtnell. It only paid, on 13 January 2003, a sum of £610,883.50. The justification for paying the lesser sum advanced was set out in a letter dated 10 January 2003 written by Kaduna's solicitors, Messrs. Masons, to Durtnell's solicitors, Messrs. Berrymans Lace Mawer as follows:
"*In reviewing the Adjudicator's Decision it is clear that the Adjudicator exceeded his jurisdiction in relation to that element of his Decision which deals with the award of an extension of time to the date of Practical Completion, which the Adjudicator decided was 24 October 2002.*
At the date of the Adjudication, being 20 November 2002, no dispute had arisen in relation to the extension of time sought and this point is pleaded at paragraph 30 of Kaduna's response.
Since the Adjudicator exceeded his jurisdiction in relation to the award of extensions of time, it follows that his award in relation to prolongation costs and repayment of liquidated damages fall away, as does the extension of time awarded.
On this basis we calculate that the sums properly due to your clients arising out of the Adjudication are as follows:…
We repeat that our clients are very keen to pay the monies properly due to your clients and we look forward to receiving your proposals for breaking the impasse at the Bank of Bermuda caused by your clients' actions."

18. On 14 November 2002 FMA issued an interim certificate numbered 41 in which an amount of £60,434.61 was stated to be due to Durtnell from Kaduna. In a letter dated 3 December 2002 to Durtnell Kaduna wrote
"This is a notice under Clause 30.1.1.4 and 24.2.1 of the Contract.
You are aware that the Architect has issued a Certificate under Clause 24.1, which was dated 3 December 2002.
You will also be aware that by our letter dated 12 September 2002, we gave you notice under Clause 24.2.1 that we require you to pay or allow us liquidated and ascertained damages. This letter is also a notice under Clause 24.2.1.
By the Architect's Certificate number 41, which was issued on 14 November 2002, the amount of £60,434.61 was stated to be due. The final date for payment of that amount is 12 December 2002.
We hereby give you written notice that we intend to withhold the amount of £60,434.61 from the amount, which became due under Certificate number 41, by reason of your failure to complete the Works by the adjusted completion date. "

19. **The outstanding issues in this action** As matters have progressed since this action was commenced by a claim form issued on 30 December 2002, what remains in issue is the liability of Kaduna to pay the unpaid balance of the sum which Mr. Wilkey determined in the Decision to be payable, namely £652,788.56, and the liability of Kaduna to pay the amount of interim certificate 41, namely £60,434.61. Durtnell has sought summary judgment for those sums. The basis upon which it is contended that no answer to the claim latter, notwithstanding the writing by Kaduna of the letter dated 3 December 2002 which I have quoted, is that Mr. Wilkey determined in the Decision that Practical Completion of the Works was achieved on 24 October 2002 and that Durtnell was entitled to an extension of time for completion of the Works until that date, which findings are binding upon Kaduna unless and until disturbed by the award of an arbitrator or the decision of a court.

The grounds upon which it was contended that the determinations of the Adjudicator which were not accepted were in excess of jurisdiction

20. Mr. Adrian Williamson Q.C., who appeared on behalf of Kaduna, submitted that Mr. Wilkey had no jurisdiction to find that there was due to Durtnell a sum of £146,326.05 in respect of delay to the part of the Works undertaken by A&A in respect of any date later than 14 December 2001 because A&A had made no claim in relation to such period of delay and no claim on behalf of A&A had been included within interim application No. 40 in respect of any delay after 14 December 2001. Thus, submitted Mr. Williamson, there was at the date of the Notice no dispute concerning any entitlement of A&A to payment in respect of delay to its works after 14 December 2001. Moreover, he submitted, on proper construction of the Notice Mr. Wilkey was not asked to make a determination as to what sum was due to A&A in respect of any delay to its works after 14 December 2001.

21. As a separate point Mr. Williamson submitted that Mr. Wilkey had had no jurisdiction to decide that Durtnell was entitled to the extension of time which he awarded for two separate reasons. The first was that, so Mr. Williamson contended, as at the date of the Notice there was no dispute at all between

Durtnell and Kaduna as to whether Durtnell was entitled to any extension of time beyond 22 February 2002 and payment of any amount by way of loss and expense in consequence because an application for a further extension of time had been made to FMA, the time allowed in the Contract for FMA to make a determination in respect of the application had not expired, and FMA had not yet made a determination. The second reason was that, as Mr. Williamson submitted, on proper construction of the Notice Mr. Wilkey was not asked to decide whether Durtnell was entitled to an extension of time and payment of loss and expense on the ground upon which he did in fact so decide, namely that the matters raised in paragraph 3.3 of the Notice, to which I shall refer hereafter for convenience as *"the Extra Works "*, were variations the carrying out of which caused the completion of the Works to be delayed. Mr. Williamson submitted that by paragraph 3.3 of the Notice what was being sought was simply a decision in principle that the matters there mentioned were variations capable of giving rise to an entitlement to extensions of time and payment of loss and expense, and valuation of them simply as items of work, not any assessment of whether they did actually cause delay to the completion of the Works and, if so, the amount to which Durtnell was entitled by way of payment of loss and expense.

22. In the context of his submission that at the date of the Notice there was no dispute as to the entitlement of Durtnell to an extension of time or payment of any further sums by way of loss and expense in respect of any period after 22 February 2002 Mr. Williamson drew to my attention that under cover of a letter dated 9 September 2002 Durtnell submitted to FMA what was described as an application *`for a further Extension of Time beyond the 22 February 2002 the date to which the contract is currently extended."* Under clause 25.3.1 of the Contract FMA was bound to determine the application within 12 weeks of receipt of the notice by which the application was made. That is to say, in this instance the application should have been determined by 2 December 2002. Durtnell's letter dated 9 September 2002 set out what were alleged to be the "Relevant Events" which entitled it to an extension of time, as it contended to 6 September 2002. Those *"Relevant Events"* were alleged to be:

"1. *Sundry additional work instructed by Format Milton Architects.*
2. The EIB system and interface with other services.
3. Default of Article 3 and disregard of acceptance of work by Robert Adam Architects.
4. The shutter hinge variation.
5. Shrinkage and movement.
6 Enhanced specification.
7. Protracted snagging, refusal to carry out snagging inspections and delayed issue of snagging lists.
8. Statutory holidays 2002. "

The grounds upon which an extension was sought thus included the execution of the Extra Works. In the event, by a letter dated 2 December 2002 FMA communicated to Durtnell its decision to grant an extension of time for completion of the Works to 8 March 2002.

23. In relation to the claim in respect of interim certificate 41 Mr. Williamson submitted that Kaduna was not bound to pay it for the reasons set out at paragraph 34 of the witness statement of Mr. Laurence Fryer dated 21 February 2003, namely: "*... they were entitled to set off accrued liquidated and ascertained damages against this sum on the basis of the extensions of time then granted by the Architect. A copy of the relevant Withholding Notice dated 3rd December 2002 is at Exhibit LDF 11. Kaduna remained so entitled notwithstanding FMA 's extension of time award of 2nd December and Certificate of Non-Completion of 3rd December. These documents were not, of course, subject to adjudication but remain effective as between the parties. Durtnell now contend that Kaduna had no such entitlement and in support of this contention rely on the Adjudicator's Decision extending time to 24th October 2002. For reasons set out above, Kaduna contend that the Adjudicator had no jurisdiction to so decide. Copies of correspondence relevant to Interim Certificate 41 are attached at Exhibit LDF 11. "*

24. **Submissions on behalf of Durtnell** Mr. Martin Bowdery Q.C., who appeared on behalf of Durtnell, submitted that the points taken on behalf of Kaduna were bad points for five reasons which he set out in his written skeleton argument as follows:

"(i) *all issues resolved by the Adjudicator's Decision were in dispute when the Adjudication began;*
(ii) the dispute which was resolved by the Adjudicator's Decision had been properly referred to him;
(iii) Kaduna took part in the adjudication and raised jurisdictional objections to discrete matters but not to the claims which are now said to be jurisdictionally objectionable;

(iv) in any event Kaduna by adopting half of the Decision are approbating and reprobating the Decision. The Adjudicator held that Kaduna owed Durtnell £1,228,313.50 plus VAT Kaduna having paid Durtnell half the outstanding sum on the 13th January 2003 must now pay the balance. They cannot cherrypick which parts of the Decision they like and which parts they choose to dislike;

(v) 2003 informed Durtnell. finally, Kaduna through their agent, their architect, have waived any objection or any half-objection to jurisdiction by insisting that Durtnell's current valuation must conform with the Adjudicator's Decision on prolongation. The architect on the 6th February

"There is also considerable concern regarding your current valuations submission which does not reflect the Adjudicator's financial award, for example in respect of prolongation:"

The latter point Mr. Bowdery frankly conceded in his oral submissions was in the nature of a jury point.

25. As to what amounted to a *"dispute"* for the purposes of a reference to adjudication Mr. Bowdery referred to a decision of my own, ***Edmund Nuttall Ltd. v. R. G. Carter Ltd.*** [2002] BLR 312, in which case he appeared for the successful defendant. In my judgment at paragraph 36 on pages 321 and 322 of the report I said:

"In my judgment, both the definitions in Shorter Oxford Dictionary and the decisions to which I have been referred in which the question of what constitutes a "dispute" has been considered have the common feature that for there to be a "dispute" there must have been an opportunity for the protagonists each to consider the position adopted by the other and to formulate arguments of a reasoned kind. It may be that it can be said that there is a "dispute" in a case in which a party which has been afforded an opportunity to evaluate rationally the position of an opposite party has either chosen not to avail himself of that opportunity or has refused to communicate the results of his evaluation. However, where a party has had an opportunity to consider the position of the opposite party and to formulate arguments in relation to that position, what constitutes a "dispute " between the parties is not only a "claim " which has been rejected, if that is what the dispute is about, but the whole package of arguments advanced and facts relied upon by each side. No doubt, for the purposes of a reference to adjudication under the 1996 Act or equivalent contractual provision, a party can refine its arguments and abandon points not thought to be meritorious without altering fundamentally the nature of the "dispute " between them. However, what a party cannot do, in my judgment, is abandon wholesale facts previously relied upon or arguments previously advanced and contend that because the "claim " remains the same as that made previously, the "dispute" is the same. The construction of the word "dispute 'for the purposes of the 1996 Act and equivalent contractual provisions, in my judgment, is not simply a matter of semantics, but a question of practical policy. It seems to me that considerations of practical policy favour giving to the word "dispute " the meaning which I have identified. The whole concept underlying adjudication is that the parties to an adjudication should first themselves have attempted to resolve their differences by open exchange of views and, if they are unable to, they should submit to an independent third party for decision the facts and arguments which they have previously rehearsed among themselves. If adjudication does not work in that way there is the risk of premature and unnecessary adjudications in cases in which, if only one party had had a proper opportunity to consider the arguments of the other, accommodation might have been possible. There is also the risk that a party to an adjudication might be ambushed by new arguments and assessments which have not featured in the "dispute" up to that point but which might have persuaded the party facing them, if only he had had an opportunity to consider them. Although no doubt cheaper than litigation, as Mr. Richards's fees in the present case indicate, adjudication is not necessarily cheap. "

26. Mr. Bowdery submitted that the Extra Works were at the core of the dispute between Durtnell and Kaduna because, as he put it at paragraph 7 of his written skeleton argument:

"*- Kaduna's second architect maintained that this work was the dominant delay - described by them as remedial works to finishes see architects' letter dated 15th July 2002;*

- Durtnell contended all this work was additional varied work as it was an enhancement of the original specification. Durtnell complicated matters by also alleging that the original architect had accepted the schedule of works and had "snagged" *the house and was about to or should have issued a Certificate of Practical Completion much earlier. see Durtnell's letter dated 9th September 2002 in response to FM's letter dated 15th July 2002. "*

27. At paragraph 8 of his written skeleton argument Mr. Bowdery continued:

"What is clear is that the question as to whether what the architect considered was the dominant cause of the delay to the completion of the works:

-making good movement of timber;

-re-preparation and redecoration of the internal works;
-the dismantling, redecoration and reassembly of window hinges and shutters
was or was not varied work was in dispute and was referred to adjudication."

28. Mr. Bowdery submitted that it was no answer to the entitlement of Durtnell to rely upon the Decision in relation to the determination of the extension of time to which it was entitled and to payment of loss and expense in respect of delay for Kaduna to say that there was no dispute about these matters because the FMA was still considering, at the date of the Notice, an application for a further extension of time and had not taken longer than the period permitted by the Contract to do so, because a decision of the Architect under the Standard Form in relation to an application for an extension of time was not a condition precedent to the exercise of a right to adjudicate. That right, he submitted, was a right exercisable at any time.

29. Mr. Bowdery further submitted that it was too late, at the enforcement stage, to take objection to the jurisdiction of an adjudicator. He submitted that such objection had to be taken at the adjudication stage. In support of that submission he relied upon a decision of H.H. Judge John Toulmin C.M.G., Q.C., ***Maymac Environmental Services Ltd. v. Faraday Building Services Ltd***. (2000) 75 Con LR 101. In that case an issue was whether there was a concluded contract between parties as between which an adjudication had taken place. The party against which enforcement of the decision was sought contended that the adjudicator lacked jurisdiction because there had been no concluded contract between the parties, with the consequence that the decision of the adjudicator was unenforceble. About that submission H.H. Judge Toulmin said, at page 111 *"Faraday go further. Their primary submission is that the adjudicator's decision can be challenged on the grounds that he had no jurisdiction because no construction contract complying with the 1996 Act had been established. I have already concluded that Faraday has no realistic prospect of succeeding on the facts. Assuming that I am wrong about this, Maymac make a further submission. They say that Faraday agreed that the dispute should be adjudicated and cannot resile from their agreement. I agree with this submission. Faraday consented to submit to the adjudication and admitted that there was a contract to which the 1996 Act and the scheme apply. The adjudication was conducted on that basis. Accordingly. Faraday are estopped by representation and convention from now arguing that the Act and the scheme did not apply and that the adjudicator was not entitled to make an adjudication which would be binding until final determination of the dispute. Assuming that no contract existed and the referral was not under the 1996 Act, it was made by the parties on the basis that the adjudication took place by agreement between the parties on the same terms as the 1996 Act and the scheme, such an agreement between the parties is enforceable on the same basis as if the Act applied. "*

30. Mr. Bowdery submitted that, whereas a number of jurisdictional objections were taken on behalf of Kaduna in its response to Durtnell's Referral Notice, no suggestion was made that Mr. Wilkey did not have jurisdictiown to decide that Durtnell was entitled to an extension of time or to payment of loss and expense by reason of the execution of the Extra Works or that a further sum was payable to Durtnell in respect of the entitlement of A&A to payment of loss and expense after 14 December 2001.

31. Mr. Bowdery's last main point was that by paying part of the sum which Mr. Wilkey had determined was due from Kaduna whilst objecting to other parts of the Decision Kaduna was seeking both to approbate and to reprobate the Decision, which he submitted was not permissible. In support of that submission he relied on another decision of my own, ***Shimuzu Europe Ltd. v. Automajor Ltd***. [2002] BLR 113. He reminded me of what I had said at paragraphs 27 to 29 inclusive on page 123 of the report:

" *27. Mr. Constable also relied on the comments of His Honour Judge Gilliland Q. C. in* **Farebrother Building Services Ltd. v. Frogmore Investments Ltd** *at the conclusion of the judgment in that case: - "...It seems to me that a party cannot pick and choose amongst the decisions given by an adjudicator, assert or characterise part as unjustified and then allege that the part objected to has been made without jurisdiction. That is not permissible under the TeCSA Rules. Either the adjudicator has jurisdiction or he does not. If he had jurisdiction, it seems to me that his decision is binding even if he was wrong to reach the conclusion he did... "*

28. Miss Dumaresq submitted that both the decision in **KNS Industrial Services (Birmingham) Ltd. v. Sindall Ltd** *and the decision in* **Farebrother Building Services Ltd. v. Frogmore Investments Ltd** *were distinguishable in relation to the comments which I have quoted. She submitted that a decision may have many separate and severable elements within it.*

> 29. *In my judgment it cannot be right that it is open to a party to an adjudication simultaneously to approbate and to reprobate a decision of the adjudicator. Assuming that good grounds exist on which a decision may be subject to objection, either the whole of the relevant decision must be accepted or the whole of it must be contested. It may, of course, be important correctly to characterise what constitutes a decision of the adjudicator. It is likely that, to be relevant for the purposes now under consideration, a decision will be the answer to a question referred to the adjudicator, rather than a conclusion reached on the way to providing such answer. For example, if the adjudicator has had referred to him or her for decision both the question how much money is due to a contractor and also the question to what extension of time for completion of construction works the contractor is entitled, it is likely that it will be open to a party to the adjudication to accept the determination in relation to the sum due while disputing, if otherwise there are good grounds for so doing, the assessment of the extension of time, or vice versa. In such a case two separate questions would have been referred to the adjudicator. However, that situation is to be distinguished from the case in which in order to answer the question to what sum a party is entitled it is necessary to consider a number of elements of claim, or the case in which in order to reach a conclusion as to what extension of time is appropriate a number of grounds* of *possible entitlement to extension of time need to be considered. In each of these latter cases the result of the evaluation of the various elements will be a single cash sum or a single period of extension of time. It seems to me that the option available to a party who otherwise has good grounds for objecting to a decision that a particular sum is payable is to accept it in its entirety or not at all. He does not have the option of declining to accept the decision in its entirety, but to accept the reasoning which led to particular items being included in the overall total. Similarly with an evaluation of a period of extension of time. The overall period of extension must be accepted or none.*

The submissions on behalf of Kaduna in response

32. Mr. Williamson did not dissent from the proposition that helpful guidance as to what constituted a "dispute " for the purposes of a reference to adjudication was to be found in my comments in ***Edmund Nuttall Ltd. v. R. G. Carter Ltd.***

33. Mr. Williamson submitted that it was not enough to give rise to a dispute as to the entitlement of Durtnell to an extension of time and payment of loss and expense by reason of the execution of the Extra Works that a dispute had arisen, as he accepted, as to whether the Extra Works amounted to variations. He contended that it was plain from the terms of paragraph 3.3 of the Notice that what was sought to be referred to adjudication was simply whether the Extra Works ranked as variations, and if so, to what payment for the work as work Durtnell was entitled. It was, I think, implicit in his submissions that, in the context of an outstanding application to FMA for an extension of time based in part on the contention that the Extra Works constituted "Relevant Events ", reference of the question of principle whether the Extra Works did constitute "Relevant Events" was a worthwhile exercise because a decision in favour of Durtnell on that issue would influence the decision of FMA on the application under consideration.

34. Mr. Williamson accepted that it was not a condition precedent to the jurisdiction of an adjudicator to determine whether, under the Contract, Durtnell was entitled to an extension of time for completion of the Works or payment of loss and expense that there should first have been a decision of the Architect on those questions. However, he submitted that where Durtnell had elected to seek a decision from FMA, then so long as FMA did not take longer than the time permitted under the Contract to make its decision, until there was a decision there was nothing for Durtnell to dispute and hence no "dispute " as to entitlement to an extension of time or payment of loss and expense which could be referred to adjudication under clause 41A.

35. Mr. Williamson emphasised that the issue of what A&A might be entitled to by way of payment of loss and expense only arose in connection with the issues identified in paragraph 3.4 of the Notice in the context of the claimed entitlement of Durtnell in relation to its application No. 40. Thus there could be no question of any dispute as to the entitlement of A&A to a payment in respect of loss and expense in respect of any period after 14 December 2001 because A&A had not even formulated a claim, still less made a claim which had been contested.

36. While Mr. Williamson accepted that it would often be convenient, if a clear issue as to the jurisdiction of an adjudicator has arisen at the time of the adjudication itself, for a party which wished to raise such

question to do so then, he submitted that a party which did not raise any jurisdictional point at that stage was not forever after barred from so doing. He pointed out that the fact that there was an issue as to the jurisdiction of an adjudicator might, indeed often would, only become apparent once the decision in the adjudication was known. He submitted that the question of whether a party which did not raise a jurisdictional issue during the adjudication itself was thereafter prevented from doing so was really a matter of waiver, the determining factor being whether a party which had appreciated that a jurisdictional point was open to it had deliberately elected not to take it.

37. On the question of approbating and reprobating Mr. Williamson suggested, correctly, that in the argument leading up to my decision in **Shimuzu Europe Ltd. v. Automajor Ltd**. my attention had not been drawn to the decision of the House of Lords in **Lissenden v. C.A. V Bosch Ltd.** [1940] AC 412 or to the later decision of the Court of Appeal in **Banque des Marchands de Moscou v. Kindersley** [1951] Ch. 112. He invited me to reconsider the comments which I made in **Shimuzu Europe Ltd. v. Automajor Ltd,** in the light of what was said in those two cases.

38. In **Lissenden v. CA V Bosch Ltd.** the meaning of the doctrine of approbation and reprobation was considered by Viscount Maugham at pages 417 to 419 of the report. What Viscount Maugham said was this:

"My Lords, I think our first inquiry should be as to the meaning and proper application of the maxim that you may not both approbate and reprobate. The phrase comes to us from the northern side of the Tweed, and there it is of comparatively modern use. It is, however, to be found in Bell's Commentaries, 7'h ed., vol i, pp 141-2; he treats "the Scottish doctrine of approbate and reprobate" as "approaching nearly to that of election in English jurisprudence ". It is, I think, now settled by decisions in this House that there is no difference at all between the two doctrines. I will cite three cases. First, is the case of **Ker v. Wauchope** (1) *where Lord Eldon explained the doctrine in these terms: "It is equally settled in the law of Scotland, as of England, that no person can accept and reject the same instrument... The Court will not permit him to take that which cannot be his, but by virtue of the disposition of the will; and at the same time to keep what by the same will is given, or intended to be given, to another person. " The next case is that of* **Birmingham v. Kirwan** (2) *where Lord Redesdale treats the two doctrines as the same. He said: " The general rule is that a person cannot accept and reject the same instrument, and this is the foundation of the law of election. " The third case is that of* **Codrington v. Codrington** (3). *Lord Chelmsford observed (4): "It seemed to be considered in argument that the rule of the Scotch law that a person cannot approbate and reprobate under the same instrument was not altogether the same as the English doctrine of election, but Lord Redesdale* in **Birmingham v. Kirwan** (2) *puts them exactly on the same footing. " Lord Hatherley agreed and said he was himself about to cite the observations made by Lord Redesdale* ***in*** **Birmingham v. Kirwan** (1) *which had just been made by Lord Chelmsford. Lord Cairns L.* C. (2) *stated the matter thus: "By the well settled doctrine which is termed in the Scotch law the doctrine of "approbate " and "reprobate ", and in our Courts more commonly the doctrine of "election ", where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them ". In the light of these authorities it seems that the phrase 'you may not approbate and reprobate ", or the Latin "quod approbo non reprobo '; as used in England is no more than a picturesque synonym for the ancient equitable doctrine of election, originally derived from the civil law, which finds its place in our records as early as the reign of Queen Elizabeth: Lacy v. Anderson (3); and see as regards the history of the doctrine the very learned note of Mr. Swanston to* **Dillon v. Parker**. (4)

It is perhaps well to observe here that the equitable doctrine of election has no connection with the common law principle which puts a man to his election (to give a few instances only) whether he will affirm a contract induced by fraud or avoid it, whether he will in certain cases waive a tort and claim as in contract, or whether in a case of wrongful conversion he will waive the tort and recover the proceeds in an action for money had and received. These cases mainly relate to alternative remedies in a court of justice. The history of the common law rules, the principles which apply to them, and the effect of election are all very different from those which prevail where the equitable principle is in question.

I will not attempt to summarize all the rules which are applicable to election in equity; but it is desirable for my present purpose to state some general propositions which not I believe in doubt. In the first place, the doctrine - till the case of **Johnson v. Newton Fire Extinguisher Co. (S)** *- seems to have been confined in England as in*

Scotland to cases arising under wills, and deeds and other instruments inter vivos. In the second place the doctrine is founded on the intention, explicit or presumed, of the testator in the case of a will and of the author or donor in the case of instruments, namely, the intention that a man shall not claim under the will or instrument and also claim adversely to it. The intention it may be added is not presumed in the case of two clauses in the same will, and in such a case the doctrine does not apply; nor could the doctrine be applied in the case of a married woman where either of the properties between which she would prima facie have to elect was subject to a restraint on anticipation; for the imposition of the restraint showed an intention that the married woman should not be put to her election: In ***re Pardon's Trusts****. (1) In the third place the doctrine proceeds upon the principle not* of *forfeiture but of compensation. The beneficiary electing against an instrument is required to do no more than to compensate the disappointed beneficiaries. The balance of the property coming to him under the instrument he may keep for himself. In the fourth place no person is taken to have made an election until he has had an opportunity of ascertaining his rights, and is aware of their nature and extent. Election in other words, being an equitable doctrine, is a question of intention based on knowledge. "*

39. *In* ***Banque des Marchands de Moscou v. Kindersley*** a bank established in Russia in 1866 was dissolved by the Soviet regime in 1918. It had substantial assets in England. A winding up order was made in respect of the bank in 1932 in England. The defendants had been a customer of the bank. The liquidator of the bank claimed that a sum was due to it from the defendants and commenced an action to recover the sum claimed. The defendants took out a summons seeking an order that the claim be struck out on the ground that the bank was non-existent and the action had been commenced without proper authority. That notwithstanding, the defendants sought to prove in the liquidation for sums claimed to be due to them from the bank. At first instance the judge dismissed the summons to strike out on the ground that the defendants were seeking to approbate and reprobate by simultaneously challenging the validity of the liquidation and seeking to prove in it. The defendants appealed. In the Court of Appeal the only substantive judgment was that of Sir Raymond Evershed M.R. At pages 119 to 120 in his judgment Sir Raymond considered the expression "approbating and reprobating". He said:
"The phrases "approbating and reprobating" or "blowing hot and cold" are expressive and useful, but if they are used to signify a valid answer to a claim or allegation they must be defined. Otherwise the claim or allegation would be liable to be rejected on the mere ground that the conduct of the party making it was regarded by the court as unmeritorious. From the authorities cited to us it seems to me to be clear that these phrases must be taken to express, first, that the party in question is to be treated as having made an election from which he cannot resile, and, second, that he will not be regarded, at least in a case such as the present, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his present action is inconsistent. These requirements appear to me to be inherent, for example, in Smith v. Baker (19) *and Ex parte Robinson (20). See also the speech of Lord Atkin in* Evans v. Bartlam (21): *"I find nothing in the facts analogous to cases where a party, having obtained and enjoyed material benefit from a judgment, has been held precluded from attacking it while he still is in enjoyment of the benefit. I cannot bring myself to think that a judgment debtor, who asks for and receives a stay of execution, approbates the judgment so as to preclude him thereafter from seeking to set it aside, whether by appeal or otherwise. Nor do I find it possible to apply the doctrine of election. ": and the speech of Lord Russell of Killowen (22): "The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct; as where a man, having accepted a benefit given him by a judgment, cannot allege the invalidity of the judgment which conferred the benefit."*

40. Mr. Williamson submitted that in the present case Kaduna had not derived any benefit from the Decision. He contended that it was not enough, as Mr. Bowdery submitted, that by the Decision the liability of Kaduna, which Durtnell had contended totalled some £2,797,631, had been fixed on an interim basis at a total of £1,228,313.50 and that Kaduna had sought to rely upon the findings of Mr. Wilkey as limiting its liability in respect of those elements of the Decision which it did accept to £610,883.50. He also resisted the suggestion of Mr. Bowdery that Kaduna had received a benefit by the determination of Mr. Wilkey that Practical Completion had taken place, which entitled it, through Mr. Scheckter and his family, to take up occupation of the Property. Mr. Williamson submitted that in any event, as it was a question of intention whether the doctrine of approbation and reprobation applied, the letter dated 10 January 2003 by which Messrs. Masons on behalf of Kaduna had communicated its desire to accept the Decision as to the findings that elements totalling £610,883.50 were payable had made it clear that Kaduna was not thereby evincing an intention to accept the Decision. Finally, on this aspect,

Mr. Williamson submitted that in any event what was referred to Mr. Wilkey by the Notice was more than one dispute and the doctrine of approbation and reprobation did not apply where a party accepted a resolution by adjudication of one of the disputes referred but not another.

Consideration and conclusions

41. It is, in my judgment, plain that, unlike the position where a reference is made to adjudication under *The Scheme for Construction Contracts (England and Wales) Regulations* 1998, SI 1998 No 649, where it is clear from the terms of paragraph 8 in Part I of the Schedule that, absent the consent of all parties, only one dispute may be referred to adjudication at a time, under clause 41A of the Contract any number of disparate disputes can simultaneously be the subject of one notice of adjudication. Moreover, it seems to me that by the Notice Durtnell sought through the advisers then assisting it to refer to adjudication simultaneously a number of different disputes. Those disputes included a dispute as to whether Practical Completion of the Works had been achieved, an alleged dispute as to whether, if Practical Completion of the Works had not been achieved, Durtnell was entitled to further extensions of time for completion, a dispute as to whether the Extra Works amounted to variations for the purposes of the Contract, a dispute as to the sum which should have been found to be due to Durtnell in respect of its application No. 40, an alleged dispute as to the valuation of Durtnell's loss and expense claim for the period 22 February to 6 September 2002, and a dispute as to whether Kaduna had given valid notices before deducting liquidated damages from sums otherwise certified as due to Durtnell under the Contract.

42. In the preceding paragraph I have used the adjective *"alleged"* to describe the purported referral to adjudication by the Notice of *"disputes"* as to extensions of time and valuations of loss and expense. The reason for using that adjective is that in my judgment it cannot be said that there is a "dispute" as to entitlement to extensions of time, or as to valuation of loss and expense consequent upon a grant of extensions of time, at a time at which the question of whether there should be any extension of time, or any further extension of time has been referred to the Architect for the purposes of the Standard Form, the time allowed by the Standard form for him to make a determination has not expired, and no determination has been made. I readily accept that it is not, expressly, a condition precedent to any reference to adjudication of a dispute as to entitlement to an extension of time under a contract in the Standard Form that the dispute should first have been referred to the Architect. However, it is not easy to see how a dispute as to entitlement to an extension of time could arise until that had happened and the Architect had made his determination or the time permitted for doing so had expired. The reason is that under the Standard Form it is not for the employer to grant an extension of time or not. That function is entrusted to the Architect who is under an obligation to act impartially in making his assessment. Until the Architect has made his assessment, or failed to do so within the time permitted by the Standard Form, there is just nothing to argue about, no *"dispute"*. Whether the employer is in agreement with a claim to an extension of time is not relevant, because the decision whether one should be granted is not his and he has no role in the making of the decision. He may, under the Standard Form, have imposed upon him by the decision of the Architect, acting impartially, an extended contract period about which he is extremely aggrieved. If so, he, like the contractor, can seek to challenge the determination of the Architect by reference to adjudication. However, it is nonsensical to suggest that a "dispute " can exist between two parties as to a matter entrusted to a third party for independent decision in advance of the decision being known. For practical purposes, therefore, it seems to me that it is a condition precedent to the reference to adjudication of a *"dispute"* as to entitlement to an extension of time and as to anything which is dependent upon such decision, such as a claim for payment of loss and expense in relation to an extension of time claimed but not granted, that the person to whom the making of a decision on the relevant issue is entrusted under the contract between the parties should have made his decision, or the time within which it should have been made has elapsed without a decision being made.

43. In the circumstances it is clear, in my judgment, that Mr. Wilkey in fact had no jurisdiction to make the assessments which he purported to make as to the grant of an extension of time for completion of the Works to 24 October 2002 or as to loss and expense in respect of any period after 22 February 2002, the date for completion last fixed by FMA prior to the Notice. His decisions on those aspects of that which

was purportedly referred to adjudication by the Notice were thus invalid and made in excess of jurisdiction.

44. While, in the light of my conclusions that Mr. Wilkey had no jurisdiction to decide on any extension of time beyond 22 February 2002 or on any loss and expense in respect of the period after 22 February 2002, which at least were purportedly referred to adjudication by the Notice, it is not strictly necessary to consider whether, upon proper construction of the Notice, a claim for an extension of time by reason of the execution of the Extra Works was comprehended within what was referred, it is plain to me that it was not. Mr. Bowdery's reliance upon the terms of paragraph 3.3 of the Notice was, in my judgment, misplaced. That paragraph contained no reference to any assessment being sought of the effect upon the completion of the Works of the execution of the Extra Works. What was sought, and all that was sought, as Mr. Williamson submitted, was, first, a decision in principle of whether the Extra Works amounted to *"Relevant Events"* for the purposes of the Contract, and, second, an assessment of the value of the Extra Works as work. The latter was clear from the reference to the seeking of a declaration that the Extra Works were to be valued as per clause 13.5.4 of the Contract. I accept the implicit submission of Mr. Williamson that the decision sought in principle that the Extra Works amounted to *"Relevant Events"* was a sensible thing to seek at a time when FMA was considering a further application for an extension of time for completion of the Works against the background of its earlier indicated view that the Extra Works were not variations for the purposes of the Contract, but remedial works which had been a substantial cause of delay in the completion of the Works. A decision from an adjudicator that FMA was wrong about that would be bound to influence its decision, acting impartially, as to whether Durtnell was entitled to a further extension of time, and, if so, of how long.

45. It is also plain, as it seems to me, that Mr. Wilkey had no jurisdiction to make any assessment of an amount of loss and expense suffered by A&A in respect of any period after 14 December 2001. A&A had made no claim in respect of that period, although it had indicated that it was likely to, and there cannot possibly, in my view, be a dispute about a claim which has not even been made.

46. I reject the submission of Mr. Bowdery that a party to an adjudication must take an objection to the jurisdiction of the adjudicator at the time of the adjudication or not at all. The decision of H.H. Judge John Toulmin C.M.G., Q.C. in ***Maymac Environmental Services Ltd. v. Faraday Building Services Ltd****. is* not, in my judgment, authority for that proposition. The point which arose in that case was very similar to the point which arose in ***Furniss Withy (Australia) Ltd. v. Metal Distributors (UK) Ltd.*** *[1990]* 1 Lloyd's Rep 236, and was essentially whether it was open to a party which had participated in a dispute resolution process which depended upon the tribunal having any jurisdiction over the dispute at all, to contend at the enforcement stage that the tribunal lacked any jurisdiction. In the latter case, as in the former, the submission to jurisdiction represented by the participation in the dispute resolution process was treated as giving rise to an estopped by convention. The question which arose in the two cases which I have mentioned is a different question from the question what was the extent of the jurisdiction of a tribunal which had some jurisdiction on any view. So far as that question is concerned it seems to me that, if it is contended that the tribunal exceeded the jurisdiction conferred upon it, and the answer sought to be given is that it is too late so to contend, the issue is one of waiver. That is to say, a party is not disabled from relying upon a point that an adjudicator has decided something not referred to him or not in dispute at the time of the notice of referral unless, with knowledge of the availability of the point, he has elected not to raise it. The process of adjudication has many imperfections. Not the least of them is the risk that an adjudicator, many of whom are not legally qualified, will misunderstand the scope of the matters referred or exactly what it is that he or she is being asked to decide. It would be bizarre in the extreme if a party to an adjudication who proceeded upon the basis that his understanding of what had been referred and upon which issues decisions were required was correct should either be required to put forward formulaic, and probably, so far as the adjudicator was concerned, rather offensive *"health warnings "* to the effect that he only consented to the process insofar as the adjudicator decided matters properly referred to him or her, or was stuck with the consequences of the adjudicator *"going on a frolic of his own"* with no opportunity of complaint at the enforcement stage. In the present case it seems to me that the courses which Mr. Wilkey took which I have found were not justified and in excess of his jurisdiction were not such as Kaduna either did or should have appreciated, such that its failure to raise

the questions of jurisdiction raised before me any earlier should be treated as a waiver of the right to do so now.

47. In my view, notwithstanding the submissions of Mr. Williamson, the doctrine of approbation and reprobation is applicable to the decisions of adjudicators. In simple terms, a party to an adjudication cannot pick and choose which parts of a decision upon a dispute he will accept and which not. The decision upon a particular dispute must either be accepted in whole or not at all, assuming that the latter option is otherwise available. I accept that for the doctrine to apply it is necessary for a party, with knowledge that it is open to him to object to the decision, to take the benefit of part of it. However, I do not accept that what constitutes a *"benefit"* for this purpose depends simply upon whether the party whose receipt of a *"benefit"* is in question has obtained a net cash sum or an entitlement to a payment. It is, in my judgment, a *"benefit"* to a party, for the purposes of the doctrine, that his liability to another party in respect of any particular matter is crystallised on an interim basis at a particular amount, even though that is an amount which he is called upon to pay. Thus a party who contends that his obligation towards another party is limited to payment of a particular sum by reason of the decision of an adjudicator has both claimed and derived a *"benefit"* from that decision. It is probably also correct, as Mr. Bowdery submitted, that a party who is, in consequence of the decision of an adjudicator, entitled to take possession of a building and does so, has claimed and derived a *"benefit"* from the decision.

48, However, in the present case it is clear, as it seems to me, that although Kaduna has both claimed and derived benefits from the decisions of Mr. Wilkey on some matters in dispute by seeking to limit its liability on an interim basis in respect of those matters to the sums determined by Mr. Wilkey, those decisions related to different disputes from those in respect of which Kaduna has sought to challenge the jurisdiction of Mr. Wilkey. In the result, therefore, on the facts of the present case it seems to me that the doctrine of approbation and reprobation has no application.

49. One of the matters which was referred to Mr. Wilkey for his decision by the Notice was whether Practical Completion of the Works had been achieved, and if so, when. He decided that it had, on 24 October 2002. It seems to me that he did in fact have jurisdiction to decide those matters. If the entitlement of Kaduna to set off against its liability to pay interim certificate 41 depended simply upon whether Practical Completion had taken place, I should have held that it was not open to Kaduna to go behind that determination, which was plainly recorded in the Decision, notwithstanding that section 4 of the Decision was on its face concerned only with sums payable to Durtnell. The Decision, in my view, has to be considered as a whole in order to ascertain what was actually decided, and the question whether Practical Completion had taken place was one about which Kaduna and Durtnell were in dispute and was a matter set out in the Notice. However, the critical issue is not whether Practical Completion had taken place, but when and whether Durtnell was liable under the Contract to pay liquidated damages because Practical Completion had not been achieved earlier. Upon the second, and crucial one, of those questions Mr. Wilkey had no jurisdiction to decide. Thus the Decision provides no obstacle, in my judgment, to Kaduna relying upon its letter dated 3 December 2002 in answer to the claim for payment of interim certificate 41.

50. For the reasons which I have given it seems to me that the surviving claims of Durtnell in this action all fail.

Martin Bowdery Q.C. (instructed by Berrymans Lace Mawer for the Claimant)
Adrian Williamson Q.C. (instructed by Masons for the Defendant)